76-5382

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-

WILLIE JASPER DARDEN,

Petitioner

- v. -

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered February 18, 1976 affirming his conviction for first-degree murder and other crimes and sentencing him to death.

Citation to the opinions below

The majority and dissenting opinions of the Supreme Court of Florida are reported at 329 So.2d 287 (Fla. 1976), and are set out in Appendix A hereto.

Jurisdiction

The judgment of the Supreme Court of Florida was entered on February 18, 1976. That court denied petitioner's application for rehearing on April 19, 1976. On May 14, 1976, Mr. Justice Powell granted a stay of execution of the death sentence imposed on petitioner and on July 8, 1976 the same

Justice granted petitioner's request for an extension of time to file a petition for certiorari to September 16, 1976.

Petitioner asserted below and asserts here the deprivation of rights secured to him by the Constitution of the United States; hence, jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions presented

1. Was petitioner's right to a fair trial denied to him by the prosecution's flagrantly prejudicial and inflammatory summation to the jury, when the misconduct was (i) repeated and persistent, (ii) intentional, (iii) unremedied by a curative instruction from the court, notwithstanding defense counsel's objection, (iv) unprovoked by defense counsel, and (v) of probable importance in persuading the jury to convict and to recommend imposition of a death sentence upon evidence of guilt that was far from overwhelming?

2. Was petitioner deprived of a federal constitutional right by testimony on the state's direct case of a one-on-one identification that occurred at a preliminary hearing, when this earlier identification had been both wantonly and needlessly suggestive?

3. Was petitioner deprived of rights accorded him by the Constitution by reason of two in-court identifications, both of which may have been the product of impermisslbly and needlessly suggestive pretrial identifications?

4. Were petitioner's constitutional rights infringed by the exclusion for cause of five veniremen who acknowledged that to vote in favor of the imposition of the death penalty upon petitioner would violate their moral and religious principles?

Constitutional provisions involved

This case presents issues under the Sixth and Fourteenth Amendments to the Constitution of the United States.

Statement of the case

(a) The events and proceedings below in brief

In the early evening of September 8, 1973 Carl's furniture store in Lakeland, Florida was held up, one of its owners, Carl Turman, was shot and killed as he entered through a back door, and Phillip Arnold, a sixteen year old boy who lived nearby, was shot and wounded as he sought to give aid to Mr. Turman (R. 203-09, 211-12, 430-38).* At about the same time as these occurrances, the petitioner, on weekend furlough from a Florida prison, lost control of his girlfriend's car as he drove toward her house in Tampa and struck a telephone pole adjacent to the highway (R. 331-32, 574-77, 600). The accident took place a little over three miles from Carl's furniture store (R. 508, 539).

*References are to the pages of the record on appeal to the Florida Supreme Court.

A few hours thereafter petitioner was arrested at the home of his girlfriend and later the same night was charged with the murder of Mr. Turman, the attempted murder of Mr. Arnold, and the robbery that accompanied these shootings (R. 586).

Following a change of venue to rural Citrus County (R. 138), Mr. Darden was tried for first degree murder and the other, lesser crimes in mid-January, 1974. The principal evidence proferred by the state was two-fold: the identification of petitioner by Mrs. Turman and Mr. Arnold (R. 224-26, 492), both of whom had furnished descriptions of the assailant immediately after the crime that bore little resemblance to petitioner, and testimony from a deputy sheriff who, on the day following the crime, had found a .38 calibre pistol in a ditch thirty-some feet from the highway and about an equal distance from the place of Darden's automobile accident the evening before (R. 503-04, 511). The pistol was shown at trial to be of the same calibre as the murder weapon and to have had four bullets fired from it, but was not connected to the crime by ballistic or other evidence of a more definitive character. (R. 357-58, 514, 517-22).

Petitioner testified at length on his own behalf (R. 571-659) and told how his automobile had skidded from the highway in wet weather as he hastened back to Tampa from Lakeland to meet his girlfriend and attend a wedding later on in the the evening (R. 574-76). Both he and witnesses called by the state explained that, with the aid of a passing motorist, he had sought unsuccessfully but with seeming equanimity to locate a wrecker to take the disabled auto in tow and, having

failed in this effort, had obtained a ride to Tampa (R. 577-79, 330-31, 334-35, 340-41). Petitioner denied having been at the furniture store or having anything whatever to do with the crimes with which he was charged (R. 592-93, 598-99).

Petitioner's recitation of the events of the evening of September 8 was neither implausible in itself nor, apart from the identification testimony of Mrs. Turman and Mr. Arnold, was it in direct conflict with the state's evidence.

In sum, at the close of the evidence, the prosecution's case for conviction was a doubtful one and depended, in large measure, upon the jury's acceptance of the identification testimony of the state's two principal witnesses. With this uncertainty, the summations to the jury took on particular importance.

The first of the two prosecutors to sum up for the most part confined himself to the evidence (R. 738-46); the second, Mr. McDaniel, largely ignored the evidence and devoted his address to what was surely a calculated effort to arouse the jurors' passions and to distract them from the proper performance of their task (R. 749-81). Thus, within less than thirty-five transcript pages, McDaniel time and time again focused upon the Florida Division of Corrections as that "unknown defendant" who, through the weekend furlough, had turned petitioner loose "on the public" (R. 749-52, 753-54, 764-65, 766, 782); repeatedly expressed his wish that petitioner had "blown his [own] face off" (R. 758-59, 774, 775, 779); asserted his own opinion as to petitioner's credibility, explaining to the jury that, were he in the defendant's position, he also would have "lie[d] until my teeth fell out" (R. 755;

see R. 748, 769, 770, 777-78); branded Darden an animal who belonged "at the other end of [a] ... leash" (R. 750) and made numerous other flagrantly inflammatory and irrelevant remarks.*

Following the summations, the jury brought in a verdict of guilty on all counts and, in the second half of the bifurcated trial, recommended imposition of a death sentence, a recommendation embraced by the trial judge.

On appeal, the Supreme Court of Florida affirmed petitioner's conviction and sentence by a five to two vote, the dissenters urging that, by reason of the prosecution's misconduct in summation, Mr. Darden was entitled to a new trial, both as a matter of state law and under the command of the Due Process Clause of the Fourteenth Amendment to the Constitution.

(b) The facts pertinent to the identification issues

As we have said, the identification testimony of Mrs. Turman and of Mr. Arnold was central to the prosecution's case. We describe below how the in-court identifications by both witnesses had been preceded by needlessly and impermissibly suggestive pretrial identifications, one of which was, in addition, conducted in the absence of petitioner's counsel. We also point out how Mrs. Turman was permitted to describe on the state's direct case her initial one-to-one identification of the defendant at a preliminary hearing.

* The full text of the prosecutors' summations are set out in Appendix B to this petition. The principal improprieties in the summations are quoted in point I of our argument (pp. 12-26, infra).

According to Mrs. Turman, she was alone in the furniture store just prior to closing time on the evening of the crime (R. 200-01). A heavy-set black man had come in ostensibly to look for used furniture for some apartments (R. 203-04). After examining a variety of furniture and appliances, the customer appeared to leave the store, only to return in a moment's time, pistol in hand, demanding the money in the cash register (R. 205-07, 244-45). Mrs. Turman testified that, as she and the robber moved toward the back of the store, her husband entered through the rear door and was shot down in his tracks as she cried out a warning (R. 207-08).

A threatened sexual assault followed but, almost immediately, Philip Arnold, who lived just a few houses away from the furniture store, pushed open the back door, saw the prostrate Mr. Turman, and squatted down to give aid to him (R. 210-13, 430-35). Within a few seconds, however, the assailant moved toward Mr. Arnold, shot him in the mouth as he looked up from his squatting position, and shot him again in the neck as he turned to flee (R. 212-13, 435-37). A third bullet struck Mr. Arnold from the rear as he ran toward his home and the gunman hastened out of the store behind him (R. 437-38).

All told, according to Mrs. Turman, she was in the presence of the robber for perhaps ten minutes, while Mr. Arnold testified that he saw the gunman for no more than twenty or twenty-five seconds, during a portion of which his attention was focused upon the body of Mr. Turman (R. 230, 245, 495-97).

Within an hour or two of the crime, Mrs. Turman described the attacker to a deputy sheriff as a heavy-set, clean-shaven black man with a fat face and of her own height -- five foot, six inches -- wearing a dark colored pullover sports shirt (R. 226-27, 237-39). When asked by the deputy whether she would be able to identify the criminal upon sight, she replied, "I would try, I would try; I might -- I don't know" (R. 239).

In contrast to this description the trial testimony showed that petitioner was five feet, ten or eleven inches tall and weighed around 170 to 175 pounds (R. 596). Moreover, one of the state's witnesses, a motorist who had stopped at the scene of the auto accident that occurred, according to the prosecution's theory, when petitioner was fleeing the scene of the crime, testified that Darden was wearing a white or greyish shirt that buttoned down the front and that he had a moustache (R. 311, 313, 318-20).

In view of these contradictions, the unfair circumstances of Mrs. Turman's pretrial identification of petitioner are particularly significant. Although, as we have noted, petitioner was arrested and charged with Mr. Turman's murder and the other crimes within a half-dozen hours of the event, the authorities did not request Mrs. Turman to identify Darden in a line-up or in any other fashion until some four days later (R. 586, 226, 216). The identification that then occurred took place during Mrs. Turman's testimony at a preliminary hearing, as petitioner sat with his counsel at the defense table -- apparently the only back man among the few people in the courtroom (R. 257-62).

Thereafter, Mrs. Turman was permitted once again to identify petitioner at his trial. To buttress this identification, the prosecution also brought out, on direct examination, the earlier identification that she had made. The prosecution questioned Mrs. Turman thus:

> "Q. Do you remember when the funeral [of Mr. Turman] was?
> A. Yes, sir, September 13th, on a Wednesday.
> Q. You say you saw Mr. Darden the day after?
> A. Yes, sir.
> Q. Where was that?
> A. At the preliminary hearing.
> Q. Did you have any trouble identifying him on that date?
> A. I did not.
> Q. And again, you're absolutely positive?
> A. Yes, sir." (R. 225-26).

In contrast to Mrs. Turman, Mr. Arnold did not tell the jury of his pretrial identification of petitioner (R. 488). Nonetheless, the credibility of his in-court idenitfication was also marred by a wantonly and needlessy suggestive photo identification not long after the crime.

On September 11, 1973 -- subsequent to the appointment of counsel for petitioner -- two sheriff's deputies visited Mr. Arnold in the hospital, where he was recovering from his bullet wounds (R. 473-75, 446). According to Mr. Arnold's testimony, elicited out of the presence of the jury, he had, by this time, already read newspaper stories about the crime which almost certainly recounted the arrest of a suspect and his identity (R. 457-59).

The deputies, Mr. Arnold recalled, had shown him six photographs and asked whether he could identify his assailant from among them (R. 447-48, 475). Four he immediately rejected out of hand, for "they didn't look anything at all like him"

(R. 449, 457). From the two remaining photographs Mr. Arnold selected that of petitioner (R. 449-50). The testimony disclosed, however, that his ability to make this choice was less than startling, for the picture of petitioner bore the name "Darden" and the date of his arrest, "9-9-73," facts of which Mr. Arnold was almost assuredly already aware (R. 453, 476-77).

Not long after this tainted identification, petitioner asked that Mr. Arnold be asked to identify him in a properly conducted lineup, but the prosecuting authorities refused the request (R. 486, 591).

(c) How the federal questions were raised and decided below

I. In connection with the selection of the jury, petitioner's counsel repeatedly excepted to the trial court's questioning of the veniremen and to its exclusion for cause of five prospective jurors on account of their conscientious scruples against the death penalty (R. 16-20, 44-46, 107, 109-10, 165). Petitioner assigned these rulings as error on appeal and the issue was extensively briefed (assignments of error 11 and 12). The Florida Supreme Court rejected this claim, sub silentio, in affirming petitioner's conviction and sentence.

II. At the preliminary hearing described earlier, petitioner's counsel strenuously objected to Mrs. Turman's testimony pursuant to the identification procedure utilized by the prosecution (R. 218-19). At trial, after hearings out of the presence of the jury concerning the state's proposed identification testimony, petitioner's attorneys objected to the court's rulings permitting such testimony (R. 214-22, 443-88).

On appeal, petitioner's counsel assigned as error the admission in evidence of the in-court identifications by Mrs. Turman and Mr. Arnold and testimony by Mrs. Turman of the preliminary hearing identification of the defendant (assignments of error 1, 2, 3, 4, 25 and 26). Although the issue was extensively briefed, the Florida Supreme Court rejected petitioner's claim without a mention in its opinion.

III. Petitioner's counsel objected to only one portion of the irrelevant and inflammatory remarks of the prosecution during summation (R. 779-80). However, this objection -- rejected out of hand by the trial court -- called into question the propriety of an entire series of the prosecutor's remarks. On appeal, petitioner assigned as error the many improprieties committed by the prosecution during summation (assignments of error 33 and 34). The issue was briefed at length and the Supreme Court of Florida rejected petitioner's claim after full discussion in its opinion.

Reasons for granting the writ

I

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE CLOSING ARGUMENTS OF THE PROSECUTION WERE SO INFLAMMATORY THAT THEY DEPRIVED PETITIONER OF A FAIR TRIAL IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

(i)

The record below presents important issues concerning the limits imposed on closing arguments by prosecutors in state court criminal jury trials by the fair trial requirement incorporated in the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The trial court, despite objection by petitioner's counsel, permitted the prosecutors* to argue persistently concerning irrelevant matters in a manner calculated to inflame the passions of the jurors and to prevent them from considering petitioner's guilt or innocence in a detached and impartial fashion. The Court should grant certiorari to consider whether the affirmance of petitioner's conviction by a divided vote of the court below was inconsistent with the principles recognized in the Court's decision in Donnelly v. DeChristoforo, 416 U.S. 637 (1974). Cf. Berger v. United States, 295 U.S. 78 (1935).

A. The State Improperly Attempted To Try Petitioner For "Offenses" Of The State Division of Corrections

Prosecutor McDaniel, the second of the state's attorneys to sum up to the jury, argued repeatedly and at

*The state divided its closing argument between two prosecutors, Mr. White and Mr. McDaniel.

length that the jurors should consider not only whether petitioner was guilty of the crimes charged in the indictment, but also should convict him of first degree murder, because the state Division of Corrections, which had allowed petitioner to leave prison on a weekend furlough, could not be trusted to keep him in prison under any other circumstance. "As far as I am concerned," McDaniel began, "there should be another Defendant in this courtroom ... and that is the division of corrections, the prisons" (R. 749). He continued:

> "As far as I am concerned ... this animal was on the public for one reason. Because the division of corrections turned him loose, lets him out, lets him out on the public. Can't we expect them to stay in a prison when they go there? Can't we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking?" (R. 749-50)

* * *

> "I wish that person or persons responsible for him being on the public was in the doorway instead of [the murder victim]. I pray that the person responsible for it would have been in that doorway and any other person responsible for it, I wish that he had been the one shot in the mouth. I wish that he had been the one shot in the neck, instead of [Phillip Arnold, one of the state's witnesses].
>
> Yes, there is another Defendant, but I regret that I know of no charges to place upon him, except the public condemnation of them, condemn them." (R. 750-51)

* * *

> "Mr. Turman is dead because that unknown defendant we don't have in the courtroom allowed it. He is criminally negligent for allowing it." (R. 752)

* * *

> "There is one person on trial, not the Polk County Sheriff's office, not the Hillsborough Sheriff's office, but he and his keepers, the Division of Corrections." (R. 764-65)

Mr. McDaniel's last words to the jury repeated this theme: "I cannot help but wish that the Division of Corrections was sitting in the chair with him. Thank you" (R. 782).*

These comments bore no rational relationship to the question whether petitioner was guilty of the crimes with which he was charged, the only offenses for which the state had a right to try him. As a district court recently said in granting a writ of habeas corpus to a state prisoner on precisely this ground when "the state sought to try not only [the defendant] but all police corruption in Newark," Perry v. Mulligan, 399 F.Supp. 1285, 1290 (D. N.J. 1975):

> "A defendant is entitled to be tried only on those matters appearing within the four corners of the indictment. It is the responsibility of the prosecutor to refrain from appeals to passion or to prejudice, and to restrict his comments to matters within the record and legitimately in issue." 399 F.Supp. at 1289.

The trial court in the case at bar allowed the prosecution repeatedly to stray far from these limitations. It permitted the state to argue to the jury that petitioner should be punished for offenses supposedly committed by the Florida Division of Corrections -- offenses not charged in the indictment and as to which no evidence had been presented.

McDaniel engaged in closely related misconduct in urging during the guilt-determining stage of the bifurcated trial that the jury recommend imposition of the death penalty upon petitioner. The prosecutor's remarks were nothing less

*See also R. 766: "He's even got a driver's license. Why in the world does -- what in the world is a State prisoner doing with a driver's license? I wonder if the public is paying for it."

than a warning to the jury that the only way to assure that petitioner would not, before long, be free from jail was to recommend a death sentence, and that the jurors should, for that reason, find him guilty of first degree murder rather than of any of the lesser offenses upon which they were charged.

> "That's the only way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it. It's the only way that anybody can be sure of it now, because the people that turned him loose -- this man served his time and if this man served his time as the Court has sentenced him, that's fine. If he's rehabilitated, fine. But let him go home on furloughs, weekend passes -- not home, strike that, excuse me -- go over with his girlfriend for the weekend, go shoot pool for the weekend, go sell his guns, or gun, for the weekend, go consume drink in the bars over the weekend." (R. 753-54)

This inflammatory line of argument drew the jury's attention to an issue not material to the determination of petitioner's guilt. Implicit in it was the contention that, were petitioner convicted of anything less than first degree murder and were he not put to death, he would serve only a short sentence or would be given furloughs and let "out on the public" again. Not only was this argument inflammatory and irrelevant to the issue of petitioner's guilt or innocence, but nothing in the record described the rights afforded by law or by the Florida Division of Corrections to those serving sentences for offenses other than first degree murder. The prosecution nonetheless made this a central issue in summation and asked the jury to accept its factual premise on its authority alone. Such an argument contributed nothing of legitimate concern to the jurors and could have had no effect other than to arouse their prejudices and distract them from their obligations. It thus encouraged violation of the rule that verdicts must be based upon the evidence and not upon appeals to emotion.

In Bruce v. Estelle, 483 F.2d 1031 (5th Cir. 1973), the Court of Appeals ordered the district court to grant a writ of habeas corpus because of a similar improper prosecutorial summation. The Court held an earlier state competency proceeding constitutionally defective in substantial part because of the "highly inflammatory and prejudicial comments of the state counsel's closing arguments to the jury." 483 F. 2d at 1039. Counsel had argued, incorrectly, that if the jury were to find that petitioner had been insane at the time of his trial he could not now be retried. "'If you want him walking the streets of your county, you go ahead and let him out; find him insane at the time of his trial and you will have effectively let him out of prison. That's what you are facing in your decision in this trial.'" Id. at 1040. The language of the Court of Appeals in that case is fully applicable here.

> "Such emotional, erroneous and prejudicial comments have no place in a dispassionate resolution of the question whether [petitioner] was competent in 1965 to stand trial.
>
> These comments most probably infected the whole decision-making process of the jury. State counsel knew that [petitioner] could be retried and his assertion to the jury that he could not was erroneous. Such irrelevant diatribes cannot be countenanced." Ibid.

B. The State Sought To Prejudice the Jurors By Appealing Improperly To Their Emotions

McDaniel's repeated expression during summation of the wish that petitioner had been maimed or killed further contributed to the denial of Darden's constitutional right to a fair trial. The prosecutor repeatedly made comments like the following:

> "I wish [Mr. Turman] had had a shotgun in his hand when he walked in the back door and blown his face off. I wish that I could see him [petitioner] sitting here with no face, blown away by a shotgun, but he didn't.... I wish someone had walked in the back door and blown his head off at that point." (R. 758-59)

McDaniel returned to this theme when he described the five times that the murder weapon had been fired. He explained that this left one bullet in the chamber. "[Darden] didn't get a chance to use it. I wish he had used it on himself" (R. 774; see also R. 775). He made a similar comment when he described petitioner's automobile accident: "I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time" (R. 775). Finally, while discussing the claim that petitioner had changed his appearance between the date of the crime and that of the trial, McDaniel gratuitously commented that "[t]he only thing he hasn't done that I know of is cut his throat" (R. 779).

It should require no citation to authority to establish that the repetition of this theme grossly exceeded the limits of permissible argument. The quoted statements were nothing more than a calculated attempt by the prosecution to transmit its hatred of petitioner to the jurors and to make that hatred a factor in their decision-making. See United States ex rel. Haynes v. McKendrick, 481 F.2d 152 (2nd Cir. 1973). Compare Kelly v. Stone, 514 F.2d 18, 19 (9th Cir. 1975) (reversing a denial of habeas corpus relief, inter alia, on the basis of the following portion of a district attorney's closing argument: "'Because maybe the next time it won't be a little black girl from the other side of the tracks; maybe it will be somebody that you know; maybe it will be somebody that I know. And maybe the next time he'll use the knife'").

C. The State Improperly Placed The Prosecutors' Personal Credibility In Issue

Both prosecutors also engaged in blatantly improper argument by placing in issue their own credibility and that of their office. Mr. White, who spoke first, was responsible for the most flagrant example of this. He concluded his argument to the jury with the following words:

> "I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Turman, that he robbed Mrs. Turman, and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life." (R. 748)

This statement was, of course, improper. Compare Kelly v. Stone, supra, where the court characterized as "a highly improper expression of personal opinion" the following, less explicit comment: "'If you can't find the defendant guilty on the facts that I have presented to you, I feel like I just might as well, you know, close up shop and go home ... .'" 514 F.2d at 19. Were this the only instance of prosecutorial misconduct, however, and had it promptly been corrected by the trial judge, perhaps petitioner's right to a fair trial might not have been imperiled. E.g., Sanchez v. Heggie, 531 F.2d 964 (10th Cir. 1976); Young v. Anderson, 513 F.2d 1969 (10th Cir. 1975). But as we have already shown, this comment was neither the only sort of wrongdoing by the prosecutors in the course of summation nor was it even the only instance in which the prosecutors added the weight of their own opinions to the trial testimony.

Mr. McDaniel, for example, repeatedly offered the jury his opinion that petitioner was not a man worthy of belief.

Since petitioner's defense consisted largely of his own alibi testimony, the prejudice from such remarks is manifest. McDaniel's remarks included the following:

a. Petitioner testified that he had asked for a lie detector test. In disussing that testimony McDaniel said: "I don't believe anything he says ..." (R. 770).

b. Petitioner testified that his alibi was the truth. McDaniel attacked this testimony in the following way: "Well, let me tell you something: if I am ever over in that chair over there, facing life or death, life imprisonment or death, I guarantee you I will lie until my teeth fall out" (R. 755).

c. Petitioner testified that he remembered the precise times of several events that occurred during the day of the murder. These statements were a crucial part of his testimony for, if true, they established that he could not have been in the Turman furniture store at the time of the crime. McDaniel's response: "I couldn't even tell you right now what day I put a witness on the stand this week. If I thought about it, maybe I could remember ..." (R. 769).

d. Petitioner testified that he stopped at a service station after his automobile accident, seeking assistance. McDaniel recounted that testimony and said: "That's what he says. I don't know that he stopped at any.... I guarantee you he was not going back to the scene of the accident until he had gotten home" (R. 777-78).

e. In addition to telling the jury that he thought petitioner a liar, McDaniel also suggested in a thinly veiled way that he knew of other instances where petitioner had shot people: "Darden doesn't like people who move after he shoots them in the mouth" (R. 761). The prosecutor, in the mind of the jury, is in a position to know if defendant has a history of violent crime, cf. Donnelly v. DeChristoforo, supra, 416 U.S. at 642, and the suggestion that he does have such knowledge is clearly inconsistent with a defendant's right to be tried only on the admissible evidence actually presented. Bowers v. Coiner, 309 F.Supp. 1064, 1071-72 (S.D. W.Va. 1970) (prosecutor discussed a gun that had not been admitted in evidence).

2. McDaniel's Summation Also Included Other Forms of Improper Argument

McDaniel's closing argument also contained numerous other instances of improper argument which, perhaps taken alone and surely when taken together with those already discussed, nullified petitioner's right to a fair trial. Some of McDaniel's comments, for example, tended to interfere with petitioner's right to the effective assistance of counsel by commenting in a deprecatory way on his exercise of that right. Indeed, McDaniel began his argument by telling the jury in effect that it should pay no attention to the argument of defense counsel that would follow because all defense lawyers always made the same arguments:

> "Now [defense counsel] and I am positive, and I assure you and I guarantee you that [defense counsel] will try the Polk County Sheriff's Office; he will try the Polk County Sheriff's Office; and he will try me. And he will try Mr. White. I guarantee that, because he has notes I gave him many years ago." (R. 749).

The inarticulate premise was, of course, that all defendants are guilty.

McDaniel committed a similar error when he discussed petitioner's statement that he would take a lie detector test if his attorney were present. McDaniel said:

> "Well, only an incompetert lawyer would allow Darden to take a lie detector test. And that prisoner, with those convictions on his record, knows that." (R. 770).

In a like vein, McDaniel attempted to shift the state's burden of proof to the defense. When defense counsel Maloney objected to McDaniel's repeated articulation of the wish that petitioner had been killed, he asked the Court to instruct McDaniel "to stick with what little evidence he has" (R. 779). McDaniel answered: "You don't have any evidence ycurself, Mr. Maloney" (R. 780). The trial court, instead of reprimanding McDaniel and instructing the jury to ignore the remark, merely said "All right, gentlemen. Proceed with your argument. Objection will be overruled. Go ahead, sir" (R. 780).

Finally, throughout his argument McDaniel repeatedly referred to aspects of petitioner's conduct while on weekend furlough from prison that were entirely unrelated to the offenses with which he was charged. Suggestive references to petitioner's relationship with his girlfriend and other comments of like character could have had no other effect than to imply to the jury that petitioner was a "bad man" and therefore probably committed the offenses charged in the indictment. Cf. Manning v. Jarnigan, 501 F.2d 408, 412 (6th Cir. 1974).

As the foregoing excerpts show, the decision of the court below was manifestly inconsistent with Donnelly v. DeChristoforo, supra. There the Court set forth the criteria to be employed in determining whether improper agrument by a prosecutor amounts to a deprivation of the right to a fair trial and entitles a defendant to a reversal of his conviction. The factors identified in DeChristoforo include the following: 1) the length and frequency of the prejudicial statements in proportion to the total length of the summation and their likely impact on the jury; 2) whether the statements were intentional and, if so, whether they were provoked by remarks of defense counsel; and 3) whether the trial judge promptly took appropriate corrective steps and, if so, the likely effectiveness of those steps.

In DeChristoforo the court found that the remarks challenged, though improper, had not deprived DeChristoforo of a fair trial. The statements at issue were only "a few brief sentences in the prosecutor's long ... closing argument which might or might not suggest to a jury that the respondent had unsuccessfully sought to bargain for a lesser charge." 416 U.S. at 647.

In the case at bar, in contrast, the record shows clearly that the prosecutor's improper remarks were neither isolated nor ambiguous. McDaniel's inflammatory and irrelevant comments took up more of his closing argument than did his consideration of the evidence. McDaniel did not merely suggest, inadvertently and ambiguously, that he knew petitioner had admitted his guilt. Instead, he attempted, intentionally

and repeatedly, to poison the atmosphere of the trial and deprive petitioner of his right to an objective, impartial jury.

In DeChristoforo this Court concluded that the prosecutor's misconduct was not intentional, principally because the challenged remark was isolated and ambiguous and could easily have slipped out in the heat of argument. "[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." 416 U.S. at 647.

McDaniel's remarks, in contrast, could only have been intentional, his lip service to the canons of ethics notwithstanding (R. 752). He repeated the improper themes over and over again. There can likewise be no doubt that the jury understood the prosecutor's meaning -- his remarks could only have been taken as encouragement to reach a decision on petitioner's guilt based on conduct of the Division of Corrections and in an atmosphere charged with hatred.* Moreover, the record is clear that the defense attorneys did nothing that might have "provoked" the prosecutors. Indeed, we submit that nothing they could have said would ever excuse conduct like that of the prosecution during summation in the case at bar.

In DeChristoforo the prosecutor's remark, "ambiguous" and "but one moment in an extended trial," "was

*Compare the famous dictum of Mr. Justice Frankfurter, dissenting in Sacher v. United States, 343 U.S. 1, 38 (1952): "A criminal trial, it has well been said, should have the atmosphere of the operating room."

followed by specific disapproving instructions." 416 U.S. at 645. The trial court in the case at bar, instead of admonishing the jury that the prosecutor's remarks were improper and directing the jury to ignore them, overruled petitioner's objection without comment (R. 779-80).* Instead of correcting the prosecutor's misconduct, the Court allowed the jury to believe McDaniel's argument was proper and worthy of consideration.

The prejudicial effect of this ruling was especially important in a trial like petitioner's, since the evidence of guilt was far from overwhelming. Moreover, even if the court had sustained petitioner's objection, reprimanded the prosecutor and instructed the jury to disregard the improper portions of his argument -- or even if the Court's general instructions on the role of argument were read as addressing this question (R.713-14, 863-64) -- we submit that petitioner would still be entitled to a reversal of his conviction. Donnelly v. DeChristoforo, supra, 416 U.S. at 644. Compare Kelly v. Stone, 514 F.2d 18, 19 (9th Cir. 1975). In the absence of any simultaneous attempt at correction by the court, the impact on the jury must be presumed substantial. Cf. Chapman v. California, 386 U.S. 18 (1967).

Significantly, even the majority opinion in the court below acknowledged that McDaniel's arguments were improper and observed that the "language used by the prosecutor would have possibly been reversible error if it had been used regarding a less heinous set of crimes." Darden v. State, 329 So. 2d 287, 290 (Fla. 1976). Turning logic on its head, the court concluded, however, that in light of the nature of the crime McDaniel's repeated improprieties were "fair comment" on the evidence. Ibid.

Even if the remarks had been comments on the evidence the court below would have been wrong -- the due process clause demands more, not less, when life is at stake than it does when the severest available penalty is incarceration for a term of years. E.g., Reid v. Covert, 354 U.S. 1, 65 (1957) (Harlan, J., concurring); Powell v. Alabama, 287 U.S. 45, 71 (1932). But here most of McDaniel's comments had nothing to do with the evidence; they were inflammatory rhetoric that did not tend to make more or less likely any fact in issue at the trial.

(iii)

The impartiality of the jury in a criminal case is fundamental to due process of law. E.g., Turner v. Louisiana, 379 U.S. 466 (1965). A defendant is entitled to an impartial, "indifferent" jury, "regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." Irvin v. Dowd, 366

*We recognize, of course, that petitioner's trial counsel objected only once to the many improper remarks in the course of McDaniel's summation. However, both the majority and dissenting opinions in the Florida Supreme Court considered the propriety of the summation on the merits and at length and such consideration is sufficient to permit this Court to grant certiorari and pass on the issue. E.g., Boykin v. Alabama, 395 U.S. 238 (1969); Coleman v. Alabama, 377 U.S. 129 (1964); Whitney v. California, 274 U.S. 357 (1927).

Moreover, notwithstanding its afterthought reference to State v. Jones, 204 So. 2d 515 (Fla. 1967), consideration of the merits by the court below was consistent with usual Florida practice. E.g., Wilson v. State, 294 So. 2d 327, 329 (Fla. 1974) ("Such absence [of objection] will not suffice [to bar appellate review] where the comments or repeated references are so prejudicial to the defendant that neither rebuke nor retraction may entirely destroy their influence in attaining a fair trial."); Grant v. State, 194 So. 2d 612 (Fla. 1967); Cooper v. Wainwright, 308 So. 2d 182, 185 (Fla. Ct. App. 1975).

U.S. 717, 722 (1961). See also, Chambers v. Mississippi, 410 U.S. 284 (1973); Sheppard v. Maxwell, 384 U.S. 333 (1966). The prosecution's actions in the case at bar destroyed the atmosphere necessary for the jury to conduct its deliberations fairly and impartially, cf. Estes v. Texas, 381 U.S. 532, 540 (1965), and deprived petitioner of that right.

Although this Court has directly addressed the issue of state prosecutorial misconduct during closing argument only in DeChristoforo, the problem is a frequently recurring one in both state and -- upon habeas corpus -- in federal courts. See, e.g., Sanchez v. Heggie, 531 F.2d 964 (10th Cir. 1976); Kelly v. Stone, 514 F.2d 18 (9th Cir. 1975); Manning v. Garnigan, 301 F.2d 408 (6th Cir. 1974); Bruce v. Estelle, 483 F.2d 1031 (5th Cir. 1963); United States ex rel. Haynes v. McKendrick, 481 F.2d 152 (2d Cir. 1973); Perry v. Mulligan, 399 F.Supp. 1285 (D. N.J. 1975). Further guidance from this Court concerning the application of the fair trial requirement to prosecutorial summation is, therefore, warranted both to assist lower courts in their review of state convictions and to assist prosecutors in shaping their conduct to proper constitutional limitations.

For all of the foregoing reasons, the Court should grant certiorari and reverse.

II

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER EITHER THE ADMISSION IN EVIDENCE OF A WANTONLY AND NEEDLESSLY SUGGESTIVE PRETRIAL INDENTIFICATION OR OF TWO IN-COURT IDENTIFICATIONS OF PETITIONER SUBSEQUENT TO IMPERMISSIBLY SUGGESTIVE PRETRIAL IDENTIFICATIONS DEPRIVED HIM OF DUE PROCESS OF LAW.

(i)

The record below presents an important constitutional question concerning the standards applicable in passing on the admissibility in a state court criminal trial of testimony of an impermissibly suggestive pretrial identification. In the present case the trial court permitted Mrs. Turman, a witness to her husband's murder, to testify during the prosecution's direct case that she had identified petitioner at a preliminary hearing some five days after the crime. Indisputably, this testimony was important to the prosecution, for it tended to validate Mrs. Turman's in-court identification of the defendant and, as we have said, the identification of petitioner was the linchpin of the state's case.

We show below that the circumstances of the identification of petitioner at the preliminary hearing were "unnecessarily suggestive and conducive to irreparable mistaken identification." Stovall v. Denno, 388 U.S. 293, 302 (1967). Thus, the record here presents an issue identical to that presently pending before the Court in Brathwaite v. Manson, 527 F. 2d 363 (2d Cir. 1975), cert. granted, 48 L. Ed. 2d 202 (May 3, 1976, No. 75-871). That question is whether a conviction secured in part through testimony of a wantonly and unnecessarily suggestive pretrial identification is, without more, subject to reversal, if both the identification and trial post-dated Stovall v. Denno, supra.

Prior to the Court's decision in Neil v. Biggers, 409 U.S. 188 (1972), there was little reason to doubt that "except in cases of harmless error, a conviction secured as the result of admitting an identification obtained by impermissibly suggestive and unnecessary measures could not stand." Brathwaite v. Manson, supra, 527 F.2d at 367. See, e.g., United States v. Fernandez, 456 F.2d 638, 641-42 (2d Cir. 1972); Kimbrough v. Cox, 444 F.2d 8 (4th Cir. 1971); United States v. Fowler, 439 F.2d 133 (9th Cir. 1971); Mason v. United States, 414 F.2d 1176 (D.C. Cir. 1969). If this be the rule today, reversal of petitioner's conviction is clearly required.

Mr. Justice Powell's opinion in Biggers created doubt about the appropriate standard to be applied on these facts by emphasizing that it is "the likelihood of misidentification which violates a defendant's right to due process." 409 U.S. at 198. "[T]he primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.'" Ibid. (quoting from Simmons v. United States, 390 U.S. 377, 384 (1968)). As Judge Friendly wrote in Brathwaite v. Manson, supra:

> "If this [passage] stood alone, it would strongly support a conclusion that the Court intended the 'very substantial likelihood of misidentification' test to apply to show-up or photographic identifications that were impermissibly and unnecessarily suggestive as well as to later out-of-court or in-court identifications." 527 F.2d at 368 (footnote omitted).

Mr. Justice Powell also observed, however, that it was unclear from the pre-Biggers opinions of the Court whether the Stovall standard is to be applied, thus requiring exclusion of identification testimony once a defendant has demonstrated

unnecessary suggestiveness conducive to misidentification, or whether the state may invoke the less stringent Simmons rule and require the defendant to demonstrate the likelihood of irreparable misidentification. 409 U.S. at 198-99. Justice Powell resolved the problem in Biggers by noting that the justification for a per se rule of exclusion is deterrence of improper police and prosecution procedures, a goal which could not be served on the facts of the Biggers case because the challenged identification preceded the Stovall decision. Biggers therefore left open the question of the proper standard to be applied in cases like the one at bar, where both the identification and the trial occurred after the decision in Stovall.

The Courts of Appeal are in conflict on this important question. The Second, Fourth and Eighth Circuits have decided this issue in petitioner's favor.* The Fifth and Sixth Circuits appear to have adopted the same rule.** The Seventh Circuit seems to have ruled the other way.***

If the Court should decide against petitioner on the foregoing issue, the record here nonetheless presents a further question: whether, on the facts, the circumstances of Mrs. Turman's preliminary-hearing identification of petitioner

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* Brathwaite v. Manson, 527 F.2d 363 (2d Cir. 1975), cert. granted, 48 L.Ed.2d 202 (May 3, 1976, No. 75-871); Smith v. Coiner, 473 F.2d 877, 880-81 (4th Cir.), cert. den. sub nom. Wallace v. Smith, 414 U.S. 1115 (1973); Sanchell v. Parratt, 530 F.2d 286, 294 (8th Cir. 1976).

** Rudd v. Florida, 477 F.2d 805, 809 (5th Cir. 1973); Workman v. Cardwell, 471 F.2d 909, 910 (6th Cir. 1972), cert. denied, 412 U.S. 932 (1973).

*** United States ex rel. Kirby v. Sturges, 510 F.2d 397 (7th Cir.) (per Stevens, J.), cert. denied, 421 U.S. 1016, (1975) (Douglas, J., dissenting).

created "a very substantial likelihood of irreparable misidentification" requiring a reversal under Simmons v. United States, supra, 390 U.S. at 384.

A. The Biggers problem in the case at bar arises from the way in which the state conducted Mrs. Turman's initial identification of petitioner. Mr. Turman was killed on September 8, 1973. Five days later, on September 13, 1973, a preliminary hearing was held; Mrs. Turman was the only witness. Petitioner, who was seated with his attorney at the defense table, was apparently the only black person in the courtroom, and certainly the only black person at the counsel table (R. 257-62).* After a few preliminary questions by the prosecutor, the court interrupted and the following colloquy took place:

"THE COURT: Ask her to identify.
MR. MARS [the prosecutor]: Yes, sir.
Q: Can you see this man sitting here?
MR. HILL [the public defender]: Your Honor, I am going to object to that type of identification.
THE COURT: I am not. Sit down.
MR. HILL: Judge --
THE COURT: Not under these circumstances, Mr. Hill.
MR. HILL: Judge, even as a defense attorney, that shows no respect in court, much less for the Court, and I ----
THE COURT: I appreciate ----
MR. HILL: And the objection, I want on the record.
THE COURT: I appreciate that. It's on the record. This woman has had a traumatic experience and she ----
MR. HILL: Judge, I appreciate that. I still have an obligation to my client.
THE COURT: I appreciate that. Now, if you want to be held in contempt, you pardon me. Alright, go ahead.

* At trial the court denied a motion to suppress, accepting for purposes of deciding the motion that petitioner had been the only black in the room at the time of the identification (R. 222).

Q: Is this the man that shot your husband?
A: Yes, sir." (R. 49-50)

Plainly, the procedures followed at the preliminary hearing were "impermissibly suggestive" within the meaning of Stovall. As the Court there said,

> "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as a part of a lineup, has been widely condemned." 388 U.S. at 302 (footnote omitted).

Cf. Foster v. California, 394 U.S. 440, 443 (1969). Indeed, the exhibition of a single suspect to a witness is "the most suggestive and, therefore, the most objectionable method of pretrial identification." United States v. Dailey, 524 F.2d 911, 914 (8th Cir. 1975). The inherent defect in such a procedure is, of course, that the state in effect has said to the witness: "We have captured the criminal. Here he is. Don't you agree?" Compare Foster v. California, supra, 394 U.S. at 443 ("In effect, the police repeatedly said to the witness, 'This is the man'") (emphasis in original).

In the case at bar, the inherent suggestiveness of the state's tactic was aggravated by the Court's pointed introduction to the procedure ("Ask her to identify"), which demonstrated to Mrs. Turman, if she did not already know, that she was expected to identify petitioner, and by the prosecutor's leading questions ("Can you see this man sitting here?"; "Is this the man that shot your husband?").* Even Mrs. Turman, on

* The state's choice of the preliminary hearing, a step in the process of charging petitioner with the murder of her husband, as the forum for Mrs. Turman's confrontation with the suspect should itself have been sufficient to call Mrs. Turman's attention to the expectation of everyone in the courtroom that she would identify petitioner. Cf. Sanchell v. Parratt, supra, 530 F.2d at 294.

cross-examination at trial, acknowledged that the prosecutor's questions directed her attention to petitioner:

> "Q: But he did in some way through the record of what was asked in the answers that were given indicate this man here?
> A: I would say yes.
> * * *
> Q: Mrs. Turman, just a couple of questions. At that preliminary hearing that Mr. McDaniel and I both have been talking about, in your mind was there any question who Mr. Mars was referring to when he asked the question, 'Is that the man that killed your husband?'
> A: No, there was no doubt in my mind.
> Q: As to who he was referring to?
> A: Right." (R. 262, 265).

It is clear, also, that the suggestiveness of the procedure was wholly unnecessary. Petitioner was taken into custody within a few hours of the crime, and there was surely ample opportunity between his arrest and the day of the preliminary hearing to conduct a lineup consistent with petitioner's constitutional rights. Certainly, the state has come forward with no suggestion of a reason for its failure to do so. Compare Smith v. Coiner, 473 F.2d 877, 881 (4th Cir.), cert. denied sub nom. Wallace v. Smith, 414 U.S. 1115 (1973).

We submit that, in view of these facts, the Court should grant certiorari and hear and decide this case in conjunction with Manson v. Brathwaite, supra.

B. If the Court concludes that Neil v. Biggers, supra, requires the application of the more lenient Simmons test to testimony concerning a post-Stovall identification, the Court should nevertheless grant certiorari, for the record presents the question whether, even absent a per se rule, Mrs. Turman's pretrial confrontation with defendant was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, supra, 390 U.S. at 384.

In section A of this point we described the respects in which Mrs. Turman's pretrial confrontation with petitioner was impermissibly and unnecessarily suggestive. In Neil v. Biggers, supra, the Court described the factors to be examined in determining whether such an identification "give[s] rise to a very substantial likelihood of irreparable misidentification," Simmons v. United States, 390 U.S. 377, 384 (1968):

> "As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Neil v. Biggers, supra, 409 U.S. at 199-200.

See Simmons v. United States, supra, 390 U.S. at 382-86. Applying the Biggers standard to the facts of the case at bar presents the substantial question whether the court below erred in finding that the circumstances of the preliminary hearing were so impermissibly suggestive as to require the exclusion at trial of testimony as to this identification. If such a finding were appropriate, then the at-trial identification of petitioner would itself, of course, also have to be excluded from evidence.

The first factor identified in Biggers was the witness' opportunity to observe. In the case at bar Mrs. Turman testified that her husband's murderer was in her presence for approximately ten minutes. The more significant question, however, is what she did with the opportunity or, as the Court phrased it in Biggers, her "degree of attention."

We know from Mrs. Turman's testimony that once the robber pointed a gun at her she was too frightened to look at him or to know what was happening, and that at one point she even covered her face with her hands and began to pray (R. 249). The record also suggests that Mrs. Turman did not pay close attention before the gun appeared. At trial she did not remember, for example, whether the robber walked around the store in front of her or behind her or, indeed, whether or not she accompanied him for part of his walk (R. 234-35). When she was asked questions about what acts not connected to the crime the robber performed while in the store, she could not remember (R. 235).

A third factor -- the inaccuracy of Mrs. Turman's prior identification -- is closely related to the first two questions. We have already described how Mrs. Turman's initial description of her husband's murderer deviated markedly from petitioner's actual appearance at the time of his automobile accident (supra, p. 8). In addition to answering directly the question posed in Biggers, this initial description suggests that, despite the opportunity that she may have had to observe the murderer, Mrs. Turman did not pay close attention to him.

In the face of these circumstances, Mrs. Turman's testimony that she was certain of the accuracy of her identification simply cannot be credited. Moreover, the state in the case at bar utterly failed to meet its burden of establishing

> "that the subsequent identification was secured by fair procedures insulating it from the prior suggestion. It must show that the factors mentioned in Biggers, including 'the level of certainty demonstrated by the witness at the [time of the] confrontation' indicate an independent and reliable identification." Sanchell v. Parratt, 530 F.2d 286, 296 (8th Cir. 1976) (citation and footnote omitted).

The state instead elicited the following testimony fr Mrs. Turman with respect to the pretrial identification:

> "Q: Did you have any trouble identifying him on that date?
> A: I did not.
> Q: And again, you're absolutely positive?
> A: Yes, sir." (R. 226)

The record demonstrates that the pretrial hearing during which Mrs. Turman identified petitioner was conducted in an atmosphere conducive to irreparable misidentification and that misidentification was, in fact, likely. The record contains none of the indicia of reliability that the Court stressed in Biggers where, for example, the witness had established a history of reliability by resisting the opportunity to identify persons other than the defendant in properly conducted lineups. 409 U.S. at 201. Finally, the record here reveals no circumstances justifying failure to adhere to a consitutionally permissible idenitifcation procedure.

(ii)

The record below also presents a substantial constitutional question arising from the identification of petitioner at trial by the witness Phillip Arnold.

Arnold, as we have described, while still in the hospital recovering from his bullet wounds, selected a photograph of petitioner from among six shown him by sheriff's deputies. He was not permitted to testify to that pretrial identification at the trial, but was allowed to tell the jury that he recognized petitioner as his assailant. The evidence is substantial that this in-court identification had its genesis in the impermissibly suggestive photo spread.

As we have said, when Mr. Arnold was shown the group of six photographs in the hospital, he immediately rejected four of them because "they didn't look anything at all like him [petitioner]" (R. 457). Of the two remaining, he chose the picture of petitioner, so he explained, because the other was "also younger and wasn't as big" (R. 464). Surely however, the burden of his task was substantially mitigated by the presence on petitioner's photo of his name and the date of his arrest, for Mr. Arnold testified out of the hearing of the jury that he had, by the time of the photo lineup, already read newspaper stories about the crime and the arrest that had occurred (R. 453, 457-59, 476-77).*

In Simmons, this Court explained the dangers of suggestive photographic identifications.

> "It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. ... This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." 390 U.S. at 383-84 (emphasis supplied).

* The testimony of deputy sheriff Neil is also significant. He testified, first, that Arnold identified the photograph in writing by copying the arrest date (R. 476), and second, that only one or two photographs other than petitioner's had a name on it (R. 477).

The fears the Court expressed in Simmons describe precisely what happened in the case at bar. Arnold had only a brief opportunity -- 20 to 25 seconds by his own testimony -- to observe his assailant, and for much of that time his attention was focused on the prostrate Mr. Turman. Arnold also testified that his mind "went blank" for some period after he saw the gun (R. 436, 500). We have already shown that of the two photographs that petitioner did not immediately eliminate the police had emphasized one of them -- petitioner's.

These facts all point to the conclusion that Arnold's at-trial identification of petitioner was the result of the suggestive conditions of the pretrial photographic identification. Moreover, just as the state need not have had Mrs. Turman identify petitioner in a suggestive context, it also need not have done so with Arnold. The state had already settled on petitioner as the murderer of Mr. Turman and was pursuing no other leads. The prosecutors could have taken more time, if more time was necessary, to gather other photographs of persons bearing a resemblance to petitioner, and they could also easily have waited until Arnold was released from the hospital and then held a properly conducted line-up.

The state's attempt to demonstrate that Arnold's trial identification of petitioner was independent of and not tainted by the display of photographs he had seen falls far short of the requirements established by this Court. As the following excerpt from Mr. Arnold's direct examination demonstrates, the prosecutor led him through a series of pro forma statements that created only the appearance of compliance with the law:

"Q: All right, Mr. Arnold, I want you to look at this man and tell me whether or not you can identify him from the time you saw him when he blasted you in the face. Can you, think back to September 8th, 1973, forget everything else, forget the hospital, forget everything, September 8th, and right now?
A: Yes, sir, that's him.
Q: Do you have any doubt whatsoever in your mind?
A: No, sir, none.
Q: Did the photographs -- are you remembering the photographs?
A: No.
Q: What are you remembering?
A: The day I was shot.
Q: Are the photographs helping you in any way?
A: No, sir.
Q: Whatsoever to identify him?
A: No, sir.
Q: None whatsoever in your mind?
A: None." (R. 466-67)

Given the way in which the photo spread was conducted, more must be required of the state than the ritualistic testimony of the witness, in response to leading questions, as to what he remembered. Without some such showing of independent memory,

> "it becomes simply a matter of judicial rhetoric to say that the earlier denial of due process is no longer influential in the witness' ultimate identification. Due process, under these circumstances, and the test of substantial likelihood of irreparable misidentification are more than mere subjective tools of the judge viewing the facts. Such tests necessarily must lend themselves to objective evaluation and the assurance necessary to overcome the pervasive dangers of misidentification." Sanchell v. Parratt, supra, 530 F.2d at 296-97.

The state in the case at bar did not offer objectively verifiable proof that Arnold's identification was adequately insulated from the suggestive display of photographs, and the record therefore presents the question of the extent of the showing the state must make to discharge its burden.

The record of petitioner's trial presents substantial questions concerning the correctness of the decisions of the courts below to permit the identification testimony of both Mrs. Turman and Mr. Arnold. The Court should grant certiorari to consider whether those decisions comply with the constitutional requirements set forth by this Court in earlier cases.

III

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE EXCLUSION FOR CAUSE OF FIVE VENIREMEN BECAUSE OF THEIR EXPRESSED ATTITUDES TOWARD THE DEATH PENALTY VIOLATED PETITIONER'S RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION

The record below presents important issues concerning the constitutionality of excluding persons who express general opposition to capital punishment from service on juries at both the guilt-determining and penalty-determining phases of trials conducted under a bifurcated procedure.

Pursuant to Fla. Stat. Ann. §921.141(3) (1974-1975 supp.), the sentence in capital cases in Florida is recommended by a majority of the jury, and the trial judge is empowered to overrule this recommendation and to enter a sentence of either death or life imprisonment. Although advisory, the jury's recommendation remains highly important to a convicted capital defendant,* for the Florida Supreme Court has said that:

> "[b]oth the trial judge, before imposing a sentence, and this Court, when reviewing the propriety of the death sentence, consider as a factor the advisory opinion of the sentencing jury. In some instances it could be a critical factor in determining whether or not the death penalty should be imposed."

LaMadline v. State, 303 So.2d 17, 20 (Fla. 1974). See also Taylor v. State, 294 So.2d 648 (Fla. 1974). Nevertheless, in the present case the Florida Supreme Court rejected without

*The decision of this Court in Witherspoon v. Illinois, 391 U.S. 510 (1968), was expressly made applicable to procedures under which juries "impose or recommend" the death penalty. Id. at 522.

comment petitioner's claim that the exclusion of five veniremen from his trial jury on account of scruples against the death penalty violated the constitutional requirements of Witherspoon v. Illinois, 391 U.S. 510 (1968).

A. The Test of Exclusion Applied by the Court Below Did Not Meet the Minimum Standards Required by the Constitution, as Construed in Witherspoon v. Illinois.

The trial court excluded five prospective jurors for cause on the basis of their expressed convictions concerning the death penalty (R. 44-46, 107, 109-10, 165). Petitioner submits that at least two of these exclusions were patently erroneous under Witherspoon.

Venireman Varney was exluded after the following colloquy:

> "[D]o you hold such conscientious moral or religious principles in opposition to the death penalty you would be unwilling under any circumstances to recommend the death sentence?
>
> * * *
>
> "MR. VARNEY: Yes, sir.
>
> THE COURT: You feel then, sir, that even though and I am not saying it will it would [sic] be purely speculative, in the event that the evidence should be such that under the law that should be the legal recommendation you would be unwilling to return such a recommendation because of your conscientious beliefs?
>
> MR. VARNEY: I believe I would.
>
> THE COURT: All right, sir. You will be excused." (R. 44-45).

Venireman Murphy was excluded on the basis of an even more perfunctory exchange:

"THE COURT: Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?

MR. MURPHY: Yes, I have.

THE COURT: All right, sir, you will be excused then." (R. 165)

Witherspoon prohibits the exclusion of veniremen for cause on account of conscientious or religious scruples against the death penalty* except under narrow and carefully defined circumstances. Such exclusions are constitutionally permissible only if veniremen make "unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Witherspoon v. Illinois, supra, 391 U.S. at 522 n.21 (emphasis in original). See also, Maxwell v. Bishop, 398 U.S. 262, 266 (1970); Boulden v. Holman, 394 U.S. 478, 482 (1969); Mathis v. New Jersey, and companion cases, 403 U.S. 946-48 (1971); Marion v. Beto, 434 F.2d 29, 32 (5th Cir. 1970).

Mr. Varney's responses to the court's questions concerning the extent and effect of his views on capital punishment fell far short of the Witherspoon requirements.

*"[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Witherspoon v. Illinois, supra, 391 U.S. at 522 (footnote omitted).

He said only that "I believe I would" be unwilling to return a recommendation that the death penalty be inflicted. This response hardly demonstrated "unambiguously," 391 U.S. at 516 n.9, or "unmistakably," 391 U.S. at 522 n.21, that Mr. Varney would "automatically" have voted against the imposition of the death penalty and did not even begin to suggest that his views on capital punishment would have prevented him from making an impartial decision as to petitioner's guilt. He expressed only a tentative belief that he would be unwilling to return a death sentence, a position that is far less certain than Witherspoon requires for exclusion. Moreover, he expressed no judgment whatever concerning the impact of his attitude toward capital punishment on his consideration of the evidence of petitioner's guilt; indeed, the court failed to inquire of him on this subject. This silence was especially important in the case at bar, since the court did not explain to Mr. Varney either his responsibilities as a juror to obey the court's instructions on the law or the meaning of the relevant concept of "impartiality."

Mr. Murphy's response to the court's questioning was equally uninformative. His response established no more than that a vote to recommend the death penalty would violate certain abstract principles. Without explaining its reasoning, the trial court inferred from this that, regardless of what the evidence showed, Mr. Murphy would never vote except in accordance with his principles. Seemingly, the court did not conclude that either Mr. Varney or Mr. Murphy would be unable to sit impartially on the question of guilt or innocence.

The responses of these veniremen are indistinguishable in substance from similar expressions of sentiment by jurors whose exclusion for cause this Court has heretofore found erroneous. See Witherspoon v. Illinois, supra, 391 U.S. at 515. For example, in Maxwell v. Bishop, 398 U.S. 262, 265 (1970) (emphasis omitted), the following colloquy took place:

> "Q. Mr. Adams, do you have any feeling concerning capital punishment that would prevent you or make you have any feelings about returning a death sentence if you felt beyond a reasonable doubt that the defendant was guilty and that his crime was so bad as to merit the death sentence?
>
> A. No, I don't believe in capital punishment."

See also, Boulden v. Holman, 394 U.S. 478, 483-84 (1969). The law is clear. Although "a mere reluctance ... or an abstract belief against capital punishment is not sufficient grounds for challenging a juror for cause," Smith v. Whisman, 431 F.2d 1051, 1052 (5th Cir. 1970), both Mr. Varney and Mr. Murphy were excused upon nothing more.

The trial court's questioning was, indeed, calculated to confuse the prospective jurors as to their duty under the new Florida statute. Although they were instructed they they would have the dual role of considering guilt and sentence separately, they were not asked whether their scruples would interfere with the determination of petitioner's guilt under a procedure in which a guilty verdict does not necessarily entail the death sentence. They were not advised during voir dire of the wide range of mitigating circumstances that jurors would be entitled to recognize in making a recommendation against death. See Fla. Stat. Ann. §921.141(7) (1974-1975 supp.). Had

they been properly instructed, the Court might well have found that their scruples did not disqualify them from sitting on the jury.

The exclusion of Mr. Murphy and Mr. Varney also presents the frequently recurring question* whether a disqualifying opposition to capital punishment can be made "unmistakably clear" as required by Witherspoon v. Illinois, supra, 391 U.S. at 522 n.21, in the absence of an instruction by the trial court that it is the civic duty of each venireman to sit as a juror and to follow the law of the state if he or she can. As the court declared in Boulden v. Holman, supra, 394 U.S. at 483-84:

> "it is entirely possible that a person who has 'a fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law -- to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case."

A venireman should therefore be instructed, at the least, that the law requires him to "subordinate his personal views to what he ... perceive[s] to be his duty to abide by his oath as a juror and to obey the law of the State," Witherspoon v. Illinois, supra, 391 U.S. at 514-15 n.7. Without such an instruction the statements of Mr. Varney and Mr. Murphy fall far short of establishing that they were either unwilling or unable to subordinate their feelings to the law of Florida, which the trial court would charge them to obey.

*See, e.g., Petition for Writ of Certiorari, Eberheart v. Georgia, No. 74-5174 (filed August 19, 1974) at 65-66. Petition for Writ of Certiorari, Noell v. North Carolina, No. 73-6876 (filed June 11, 1974) at 25; Petition for Writ of Certiorari, Jamette v. North Carolina, No. 73-6877 (filed June 11, 1974) at 17.

B. Exclusion from the Jury That Decided Petitioner's Guilt of Five Veniremen Having Conscientious Scruples Against the Death Penalty Violated Petitioner's Rights Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

Under Florida's post-Furman capital punishment statute, the jury first determines a defendant's guilt or innocence, and at a subsequent, separate proceeding makes a sentencing recommendation. Putting aside impermissible considerations of mere convenience,* a systematic exclusion of the entire class of death-scrupled jurors at the guilt phase of a capital trial would be consistent with the constitutional command of a jury "truly representative of the community," Smith v. Texas, 311 U.S. 128, 130 (1940), only if such jurors were, for some reason, found to be legitimately disqualified or unfit to sit on questions of guilt or innocence. Cf. Witherspoon v. Illinois, 391 U.S. 510, 518 (1968).

The only ground for urging such a legitimate disqualification is that the scruples of such jurors might preclude their finding guilt in a case where another jury might subsequently recommend imposition of the death penalty and such recommendation might be followed by the trial court. There is absolutely no evidence, however, to support this supposition as a fair characterization of the frame of mind or probable behavior of the excluded veniremen in this case or of veniremen who oppose the death penalty generally. Moreover, since a Florida jury's sentencing recommendation is only advisory, a death-scrupled venireman could properly

*See Taylor v. Louisiana, 419 U.S. 522, 535 (1975).

be instructed that ultimate sentencing responsibility in a capital case rests upon the trial judge, not the jury. Since a guilty verdict does not require a death sentence under Florida law, it is surely too sweeping and dogmatic to assume without inquiry that a juror with sentiments against the death penalty would thereby be unable to follow the law and to sit as a fair trier of fact on the question of guilt or innocence.

Neither untested speculation nor approximate rules of thumb can support the denial of vital constitutional rights. At stake here is petitioner's right to a fair trial and, in the final analysis, to the most precious and fundamental of human values -- life itself. "[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." Harper v. Virgina Board of Elections, 383 U.S. 663, 670 (1966). In Skinner v. Oklahoma, 316 U.S. 535 (1942), the Court struck down a compulsory sterilization law on equal protection grounds where the criteria for sterilization arbitrarily included some individuals and excluded others:

> "[W]e are dealing with legislation which involves one of the the basic civil rights of man ... . There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty .... [S]trict scrutiny of the classification which a State makes in [such] ... a law is essential ... ." 316 U.S. at 541.

Under appropriately "strict scrutiny" a practice that systematically excludes jurors from trying guilt solely because of their attitudes toward a possible penalty surely

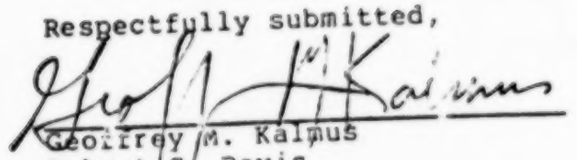
raises grave questions that this Court should resolve. Admittedly, a state could exclude from juries sitting on the guilt question in a capital case any person whose attitude toward the death penalty was such that he or she could not fairly pass on the issue of the guilt of the accused. But that proposition does not justify the state of Florida's assumption that all scrupled persons would function in this fashion; nor does it absolve the state from making a pertinent and practicable inquiry into jurors' fitness before it sweeps from juries a significant portion of the community on the theory that it is unfit. Cf. Taylor v. Louisiana, 419 U.S. 522, 534-35 (1975); Witherspoon v. Illinois, supra, 391 U.S. at 520-21.

This uncritical and unrebuttable presumption that a widely shared and reasonable attitude about capital punishment will affect a juror's performance of his civic duty on the guilt issue is constitutionally arbitrary. The Court should therefore grant review here to decide whether any such untested and unfounded presumption will support the exclusion of death-scrupled jurors from the guilt-determining jury, or whether that wholesale exclusion -- which deprives the accused of a jury that is "truly representative of the community," Smith v. Texas, supra; see Carter v. Greene County Jury Commission, 396 U.S. 320, 330 (1970) -- violates petitioner's right to equal protection and due process.

Conclusion

Petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,



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APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

76-5382

WILLIE JASPER DARDEN,
Petitioner

—v.—

STATE OF FLORIDA,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF FLORIDA

PETITION FOR CERTIORARI FILED SEPTEMBER 15, 1976
CERTIORARI GRANTED NOVEMBER 1, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

76-5382

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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CHRONOLOGY

September 11, 1973: The witness Phillip Arnold shown photographs of petitioner and others.

September 13, 1973: Preliminary hearing held in County Court of Polk County. Petitioner bound over for arraignment on first degree murder charges after being identified by Helen Turman.

September 26, 1973: Indictment returned by Polk County, Florida, Grand Jury charging, *inter alia*, that petitioner "unlawfully and from a premeditated design to effect the death of James C. Turman, did inflict mortal wounds upon the said James C. Turman, by shooting him with a pistol . . . from which mortal wounds the said James C. Turman did languish and die" in violation of Florida Statute 782.04(1) [which defines first degree murder].

January 15, 1974: Selection of petitioner's trial jury began.

January 16, 1974: Presentation of state's evidence began.

January 18, 1974: Presentation of defendant's evidence began.

January 19, 1974: Counsel for both sides made closing arguments to the jury.

January 19, 1974: Jury returned verdict finding petitioner guilty of first degree murder and of other offenses arising from the same events.

January 19, 1974: Jury returned advisory sentencing verdict recommending imposition of death penalty.

January 23, 1974: Trial court announced its judgment, sentencing petitioner to death.

February 18, 1976: Supreme Court of Florida announced its opinion affirming petitioner's conviction and the imposition of the death sentence, with two justices dissenting.

March 1, 1976: Petitioner moved for rehearing before the Florida Supreme Court.

April 19, 1976: Supreme Court of Florida denied petition for rehearing.

May 14, 1976: Mr. Justice Powell signed order staying petitioner's execution pending disposition of a timely application for a writ of *certiorari*.

July 8, 1976: Mr. Justice Powell signed order extending petitioner's time to file a petition for a writ of *certiorari* to and including September 16, 1976.

September 15, 1976: Petition for *certiorari* filed, together with motion for leave to proceed *in forma pauperis*.

November 1, 1976: Motion for leave to proceed *in forma pauperis* and petition for writ of *certiorari* granted.

[I; 21-23]*

[INDICTMENT]

IN THE CIRCUIT COURT, For The Tenth Judicial Circuit of Florida, Polk County, Spring Term, in the year of our Lord one thousand nine hundred and seventy three.

THE STATE OF FLORIDA

v.

WILLIE JASPER DARDEN

Indictment for

Count I—First Degree Murder
Capital Felony
78204(1)

Count II—Robbery
Felony
813.011

Count III—Assault to Commit
Murder in First Degree
784.06

In the Name and by the Authority of the State of Florida:

The Grand Jurors of the State of Florida, empaneled and sworn to inquire and true presentment make in and for the County of Polk upon their oath do present that

---

* The record in the Florida Supreme Court consists of eight numbered volumes of the Transcript of Record. (Volume I contains pages 1-200; Volume II, pages 201-370; Volume III, pages 1-195; Volume IV, pages 196-307; Volume V, pages 307a-424; Volume VI, pages 426-567; Volume VII, pages 568-712; and Volume VIII, pages 713-919.) In addition, there is a separate, unnumbered "Supplement to transcript of record," a separate "master index," and a separate volume containing the transcript of a hearing held on a motion to suppress certain evidence. References in the appendix to the Transcript of Record appear in brackets and include both volume and page numbers.

Willie Jasper Darden of the County of Polk and State of Florida, on the 8th day of September in the year of our Lord one thousand nine hundred and seventy three in the County and State aforesaid unlawfully and from a premeditated design to effect the death of James C. Turman, did inflict mortal wounds upon the said James C. Turman, by shooting him with a pistol, a further description of which is to the Grand Jurors unknown, from which mortal wounds the said James C. Turman did lanquish and die on the 8th day of September, 1973, contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Florida.

COUNT II

The Grand Jurors of the State of Florida, empaneled and sworn to inquire and true presentment make in and for the County of Polk upon their oath do present that Willie Jasper Darden of the County of Polk and State of Florida, on the 8th day of September, 1973, in the County and State aforesaid unlawfully by force, violence or assault or putting in fear did feloniously rob, steal and take away from the person or custody of Helen Turman, money in currency and coin of the United States of America, current of the value of one dollar ($1.00) or more, the property of Carl's Furniture and Refinishing, with intent permanently to deprive the owner of his property and the said Helen Turman was then and there entitled to the possession of the said one dollar ($1.00) or more, as against the said defendant, Willie Jasper Darden, and said Willie Jasper Darden, was not then and there the owner or entitled to possession of said one dollar ($1.00) or more, in violation of Section 813.011, Florida Statutes.

COUNT III

The Grand Jurors of the State of Florida, empaneled and sworn to inquire and true presentment make in and for the County of Polk upon their oath do present that Willie Jasper Darden of the County of Polk and State

of Florida, on the 8th day of September, 1973, in the County and State aforesaid unlawfully and feloniously, and from a premeditated design to effect the death of one Phillip Arnold, did make an assault on and upon the said Phillip Arnold with a deadly weapon, to wit: a pistol, and in furtherance of said assault the said Willie Jasper Darden did then and there shoot off and discharge said pistol at and toward him, the said Phillip Arnold, with intent to inflict divers, severe and serious wounds in, on and upon the body and limbs of him, the said Phillip Arnold, with intent then and there to kill and murder the said Phillip Arnold, in violation of Section 784.06, Florida Statutes.

A TRUE BILL /s/ C.W. Adams, Foreman of Grand Jury
Presented in Open Court this 26 day of Sept. 1973

STATE OF FLORIDA
COUNTY OF POLK

The undersigned State Attorney states that he as State Attorney of the Tenth Judicial Circuit in and for Polk County, Florida, as authorized and required by law, has advised the Grand Jury returning this Indictment.

/s/ Glen Darty
GLEN DARTY, As State Attorney
Tenth Judicial Circuit

(Certification Omitted in Printing)

[I; 45-55]

[TRANSCRIPT OF PRELIMINARY HEARING]

IN THE COUNTY COURT OF THE
COUNTY OF POLK, STATE OF FLORIDA

Case Number: CF73-2027

STATE OF FLORIDA, PLAINTIFF,

vs.

WILLIE JASPER DARDEN, DEFENDANT.

The above matter came on for preliminary hearing on September 13, 1973, at 1:30 P.M., in Courtroom "C", in the Hall of Justice Building, Polk County, Bartow, Florida, before the Honorable J. Tim Strickland, Judge. Appearances were Richard Mars, Esquire, for the State of Florida, and Jerry Hill, Esquire, for the Defense.

Thereupon, the following proceedings were had and taken:

MR. MARS: The State is prepared for the preliminary hearing of the State of Florida vs. Willie Jasper Darden.

MR. HILL: Your Honor, Mr. Darden is represented by the Public Defender's Office, and we're ready to proceed at this time. We would request that the rule be invoked.

THE COURT: Who are your witnesses?

MR. MARS: The State has three witnesses, Your Honor, Mrs. Helen Turman, Mrs. Edith Hill, and Don Neal.

The State would call Mrs. Helen Turman as it's first witness.

THE COURT: Alright. Would the other two individuals stand, so I can see who we're talking about.

MR. MARS: Don Neal and the lady in blue, Judge. Mrs. Helen Turman is the woman in the blue dress on the right hand side.

THE COURT: Alright. Mrs. Turman, if you and Mr. Neal will—

MR. MARS: Mrs. Turman will be the first witness, Your Honor.

THE COURT: First witness, alright. Mr. Neal, and who is the other one?

MR. MARS: Edith Hill, and she is outside.

THE COURT: Have her come in because I want her to hear these instructions.

THE COURT: Mrs. Hill, you can stand right there. I just wanted you to hear what I was going to say. I want both of you out of the room at this time. I don't want you to discuss anything among yourselves or anyone else about this case, and after you have testified and gone back outside, I do not want you to discuss anything among yourselves or with anyone else about this case.

Alright, the two of you can step outside.

MR. HILL: Judge, there's a number of charges involved here this afternoon and I would certainly request, if possible, it would be identified as to which charge, each witness is—

THE COURT: What are your intentions, Mr. Mars?

MR. MARS: The State would take them one at a time, Your Honor, and start with the murder.

MR. HILL: That's fine. If you move on, let me know in case I haven't picked it up.

Thank you, sir.

THE COURT: Alright. This is the preliminary hearing of State of Florida vs. Willie Jasper Darden, charged with murder, assault to commit murder, armed robbery, assault to commit rape. Is that everything?

MR. MARS: Yes, sir.

MR. HILL: Mrs. Turman will be testifying to all four of these charges, is that correct?

MR. MARS: (Nods head.)

THE COURT: Alright. Mrs. Turman, would you like this lady who is with you to come up to the stand and be with you while you are testifying?

MRS. TURMAN: Yes, sir.

THE COURT: Alright. You can have a seat right here. Alright. Now, face me and raise your right hand.

HELEN LEE TURMAN

having been produced as a witness on behalf of the Plaintiff and having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MARS:

THE COURT: Alright. Now, you speak loudly so everyone can hear what you have to say.

Q. Would you state your name, please?

A. Helen Lee Turman.

Q. Mrs. Turman, did your husband own a furniture store, Carl's Furniture?

A. Yes, sir.

Q. Is that store in Polk County?

A. Yes, sir.

Q. Were you and he present in that store on the 9th day of September of this year, in the evening?

A. At first only I was in there alone when the gun was pulled in my back. My husband surprised him by opening the back door and starting in and this man still had a-hold of my arm. He raised a gun and shot my husband between the eyes.

THE COURT: Ask her to identify.

MR. MARS: Yes, sir.

Q. Can you see this man sitting here?

MR. HILL: Your Honor, I am going to object to that type of identification.

THE COURT: I'm not. Sit down.

MR. HILL: Judge—

THE COURT: Not under these circumstances, Mr. Hill.

MR. HILL: Judge, even as a defense attorney, that shows no respect in court, much less for the Court, and I—

THE COURT: I appreciate—

MR. HILL: And the objection, I want on the record.

THE COURT: I appreciate that. It's on the record. This woman has had a traumatic experience and she—

MR. HILL: Judge, I appreciate that. I still have an obligation to my client.

THE COURT: I appreciate that. Now, if you want to be held in contempt, you pardon me.

Alright, go ahead.

Q. Is this the man that shot your husband?

A. Yes, sir.

Q. Did you subsequently go to the hospital? Did you go to the hospital that day?

A. I went later, two hours later after they got through talking to me in the store.

Q. Did anybody—is your husband now alive or is your husband deceased?

A. My husband passed away at eleven o'clock Saturday night.

Q. September the 9th?

A. Yes, sir.

Q. Okay. Did this man say anything to you when he came into your store?

A. He said he wanted to buy some furniture for some rentals. He wanted two sofas, two cook stoves, electric ranges, three sets of bedding and he said his wife would be in later, to look at it. Then he turned like he was leaving. I thought he had left when I started back toward the back of the store, and he called me back and said he wanted to look at the stoves, and he wanted me to figure it up. I showed him the stoves and as I started back around through the front of the store I saw he had closed the front doors and that's when he grabbed my arm and put the gun in my back.

Q. Okay.

MR. MARS: I have no further questions at this time.

CROSS EXAMINATION

BY MR. HILL:

Q. Mrs. Turman, just one or two questions. Was anyone else present there in the store?

A. No, sir.

Q. Do you remember what time this gentleman entered the store?

A. No, sir. I did not look at the clock, but it was approximately six o'clock, because that's the time my husband always went to the house to feed my poodles for me.

Q. Yes, ma'am. Do you remember the type of clothes being worn by the man inside the store?

A. I can't remember the color precisely what he had on, but I do remember a stripe around the top of the t-shirt and I think a stripe around the bottom of it. I won't swear to that.

Q. Yes, ma'am. It was a t-shirt, did you say?

A. Yes, sir.

Q. Did you—I believe you stated earlier that this man put a pistol in your back, is that correct?

A. Yes, sir.

Q. Once that pistol was put in your back, did you have an occasion to see that man anytime again before he left the store?

A. Yes, sir.

Q. Do you know how long—

A. I can't say how long.

Q. Yes, ma'am.

A. But, I will say when my little neighbor boy come running to our defense, not knowing what was going on—when he shot at Phillip, he fired two shots from the store outside at Phillip and Phillip run, and that's when he dropped loose of me and proceeded to pursue after Phillip.

Q. And did you see him again after he pursued after Phillip?

A. No, sir. I did not.

Q. Had you ever seen this man in your store before?

MR. MARS: Your Honor, I would object to that as being outside the scope of direct examination and getting into discovery.

THE COURT: Sustained.

MR. HILL: I have nothing further, Your Honor.

MR. MARS: At this time, Your Honor, the State would move that the defendant be bound over to the Circuit Court on the charge of murder.

THE COURT: Mrs. Turman, I have only one question, because it's very important and I'll have to go back over it one more time, to be sure.

A. Yes, sir.

THE COURT: Are you sure about the identification of this man you see in front of you as being the same man that you've spoken about?

A. Even with his back to me while I sat back there, I reached over and touched my sister's hand and said, "That's him."

THE COURT: Alright.

MR. HILL: Your Honor, this is not an objection. The only thing I believe was completely left out was location, and I think this would be the time to give the State and opportunity to—

THE COURT: Well, there was testimony that it was in Polk County.

MR. MARS: I said Carl's Furniture Store.

MR. HILL: I heard that. I didn't hear the Polk County.

THE COURT: No, he asked if it was in Polk County.

MR. HILL: Okay.

THE COURT: Alright. The Court is going to bind this matter over on first degree murder to the Circuit Court for arraignment to be held—

MR. MARS: Your Honor, may I have a moment to confer with Mr. Weatherford? There are other charges pending against this fellow and if I could find out from Mr. Weatherford how much time he needs—

THE COURT: Well, I'm going to set it for three weeks from next Monday. Does that cause you any problem, Mr. Weatherford?

MR. WEATHERFORD: No, sir. I'm not actively investigating this case.

THE COURT: Alright.

MR. HILL: There is a matter of a grand jury anyway, I believe, in a crime of this nature, sir.

THE COURT: Well—
MR. MARS: At this time, Your Honor, the State would no bill the other charges for the preliminary hearing.
THE COURT: As to what?
MR. MARS: We would no bill the armed robbery, assault to commit murder, and assault to commit rape.
THE COURT: Alright. You ladies can have a seat. Is that everything?
MR. MARS: The State has no further business.
MR. HILL: That's all, Your Honor.

(Hearing concluded.)

[Court reporter's certificate omitted in printing]

[III; 2-182]

[TRANSCRIPT OF JURY SELECTION AT PETITIONER'S TRIAL]

IN THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR CITRUS COUNTY, FLORIDA

STATE OF FLORIDA, PLAINTIFF,

vs.

WILLIE JASPER DARDEN, DEFENDANT.

Case No. CF 73-2027

TRIAL of the above-styled cause was held on January 15, 16, 17, 18 and 19th, 1974, in the courtroom, County Courthouse, Inverness, Florida, beginning at 9:00 A.M. o'clock, before the Honorable John H. Dewell, Judge presiding.

Appearances were: C. Ray McDaniel, Esquire, Assistant State Attorney; Norman White, Esquire, Assistant State Attorney, for the State; Raymond A. Goodwill, Esquire, Assistant Public Defender and Dennis Maloney, Esquire, Assistant Public Defender, for the Defendant; the Defendant; the witnesses; The Court Clerk; and the official court reporter.

Thereupon the following proceedings were had and taken:

* * * *

[DEFENSE MOTION TO LIMIT VOIR DIRE]

* * * *

THE COURT: All right. We are here to hear a motion. The State and the defendant represented by counsel, the defendant is present in person. We are to hear a motion by the defendant to limit the State Attorney of his voir dire examination, arguing the Willie Spoon case.

All right, sir, I am not inclined to grant it. I will be glad to listen to you on it.

MR. MALONEY: Your Honor, I do not wish to argue very longly. The Court held in the Willie Spoon case the prosecutor could not ask these type of questions. In Florida we now have biforcated trial. The first part of the trial is used only to determine the question of facts, whether or not this individual committed a capital crime.

THE COURT: Yes, sir.

MR. MALONEY: I think that a question regarding how the jury would be disposed to punishment in the event they found a verdict of guilty would be irrelevant and immaterial to that trial and to their determination of the question of fact, whether or not he did it. And all we are asking is that such questions first not be asked by either parties, and if, in fact, the Court is going to allow the questions to be asked, that a response in the negative they would not impose the death penalty not constitute a challenge for cause.

THE COURT: No, sir, if, at the conclusion of the trial, the jury should return a verdict of guilty of murder in the first degree, which is a capital offense, the same jury would serve as the jury in the second half of the biforcated trial and there will not be a reselection of a jury. At this time on voir dire it is necessary to ask questions of this jury including their attitude on such things and it's got to be now.

Under the Florida capital punishment law there are certain conditions set up under which the proper penalty is the death penalty. In a prospective jury—It is my ruling if a prospective juror states on his voir dire examination that because of his moral, religious or conscientious principles and belief he would be unwilling to recommend a death penalty, even though the facts and circumstances meet the requirements of law, then he in effect has said he would be unwilling to follow the law the court shall charge upon it and disregard and be unwilling to follow it or if he did follow it, it would be going against his principles, and, therefore, I would rule that would be disqualification. If that exists, I intend to disqualify for cause.

You made your motion and your objection and the motion will be denied. You will, of course, be allowed at the time of the voir dire examination to raise your namely objection, but would indicate the ruling at this time. I am not cutting you off from objecting when we get to that specific question. Generally, that will be my ruling. I won't cut them off from inquiring in the general area; the specific questions they ask may be objectionable, I don't know.

MR. MALONEY: If I raise the objection, which I would, will the Court make it a continuing objection?

THE COURT: Yes, sir.

MR. McDANIEL: Is the Court saying it is going to be a continuing objection from here on out?

THE COURT: Continuing objection to that particular line of questions.

MR. McDANIEL: I take it your objection right now is continuing from here on out?

THE COURT: Yes, sir, to the whole general line of questions. Still I am not telling you I will deny your objection on some specific question for some other reason you feel it has gone too far.

MR. MALONEY: Yes, sir.

* * * *

[TRIAL COURT'S INSTRUCTIONS TO JURY ON SENTENCING RESPONSIBILITY]

* * * *

THE COURT: Now the first count, first degree murder, charges what is under the present law a capital offense. You may be aware that some time ago the capital punishment law of Florida was declared invalid by the Courts, by the U.S. Supreme Court. Since then the legislature has passed a new capital punishment law in Florida that is, and that law is in effect here today. Now under the new law in the event of a capital crime, such as we have here today, we have what is known as a bifurcated trial. That is a trial will be conducted in two parts.

In the first part the jury will hear the evidence in the case and will determine the guilt or the innocence of the defendant without regard to punishment at all, just determine the guilt or innocence of the charge. In the event the jury should return a verdict of not guilty or guilty of some lesser included offense less than a capital crime, of course, then that is the end of the trial. In the event that the jury should come back with a verdict of guilty of first degree murder, which is the capital offense then would be held by the same jury the second part of the bifurcated trial.

During the second part of the trial the jury would then be allowed to hear additional testimony concerning facts that were not admissible in consideration of the guilt or innocence. Matters of age or other factors listed in the Statute of mitigating or aggravating factors which could be considered. The jury would then, by a majority vote—now a vote of guilt or innocence must be a unanimous verdict, everyone must agree—but on your second verdict which is known as an advisory sentence the jury by a majority vote would recommend to me as a Court what the proper sentence should be. If they find that the aggravating circumstances are sufficient and they are not outweighed by mitigating circumstances then the proper recommendation would be that the death penalty be imposed. If they find that the mitigating circumstances outweigh any aggravating circumstances, then the recommendation, the verdict should be the advisory sentence should be for life imprisonment.

In either event the final decision is not the jury's. The final decision is restedly solely with the Court. It will be my decision in the event of a verdict of guilty of first degree murder it will be my decision to whether or not, my determination alone, as to whether or not this defendant should go to the electric chair. I do want you to understand though that the law intends and I certainly would give great weight to what the advisory sentence would be. So you should not take your duties lightly. However, I would not be obligated to follow it. The jury might return a recommendation, advisory sentence of the death penalty and I might reduce it to life imprison-

ment and the jury might recommend life imprisonment and I would feel that they were wrong and sufficiently strongly to go ahead and administer the death penalty anyway. Both have been done in this state under the law, the new law.

Now that is a procedural situation, that is where we stand. I will tell you further in the event of life imprisonment on a capital crime the law provides that the defendant shall serve not less than twenty-five calendar years before he becomes eligible for parole which is contrary to the usual life sentence in any other life sentence the ordinary parole laws would apply.

Now do y'all understand the procedure in a bifurcated trial?

* * * *

[VOIR DIRE CONCERNING JUROR VIEWS ON DEATH PENALTY]

* * * *

At this time I want to get off into a different area concerning the capital punishment feature of the case. I have explained to you already the basic procedure. How we have a two section trial and how although the final determination in the event of a verdict of guilty of first degree murder the final determination as to penalty will be mine. But that you, if you are selected on the jury, would be called upon to listen to further testimony and to advise me by advisory sentence.

Now at the time of the submission of the case, should that time ever arrive, you will be instructed by me on the law as to what matters you should consider and what you should not consider and how you should go about in arriving at your advisory sentence. Under certain circumstances if you find the aggravating circumstances are sufficient they are not outweighed by mitigating then it would be proper under the law your correct verdict would be to recommend the death penalty.

Now I am going to ask each of you individually the same question so listen to me carefully, I want to know if any of you have such strong religious, moral or con-

scientious principles in opposition to the death penalty that you would be unwilling to vote to return an advisory sentence recommending the death sentence even though the facts presented to you should be such as under the law would require that recommendation? Do you understand my question?

MR. MALONEY: Your Honor, pursuant to the motion I filed beforehand I object to this question. I believe that it is irrelevant to the matter at hand and I think that the discussion of this at this time prejudices the defendant's right to a fair and impartial trial.

THE COURT: All right, sir. Motion will be denied and the objection overruled.

All right, Mrs. Macy, do you hold such conscientious moral or religious principles in opposition to the death penalty you would be unwilling under any circumstances to recommend the death sentence?

MRS. MACY: No, sir.

THE COURT: Do you, Mr. Blankenship?

MR. BLANKENSHIP: No, sir.

THE COURT: Mr. Pelellat?

MR. PELELLAT: No, sir.

THE COURT: Mrs. Spike.

MRS. SPIKE: No, sir.

MR. VARNEY: Yes, sir.

THE COURT: You feel then, sir, that even though and I am not saying it will it would be purely speculative, in the event that the evidence should be such that under the law that should be the legal recommendation you would be unwilling to return such a recommendation because of your conscientious beliefs?

MR. VARNEY: I believe I would.

THE COURT: All right, sir. You will be excused.

MR. MALONEY: I renew the objection. I do not think he should be challenged for cause.

THE COURT: Yes, sir, the objection will be noted and overruled.

All right, Mr. Varney, you will be excused. Thank you very much for your service.

CLERK: Debora Ratley.

(Ms. Ratley was seated in the jury box.)

CLERK: Number 114.

THE COURT: Mrs. Hann, do you hold such strong conscientious moral or religious beliefs that you would be unwilling under any event to return a death sentence?

MRS. HANN: No, sir.

THE COURT: Mr. Waller?

MR. WALLER: No, sir.

THE COURT: Mr. DeMilt?

MR. DeMILT: No, sir.

THE COURT: Mr. Dorminy?

MR. DORMINY: No, sir.

THE COURT: Mrs. Keck?

MRS. KECK: No, sir.

THE COURT: Mr. Roberts?

MR. ROBERTS: No, sir.

THE COURT: Mr. Mays?

MR. MAYS: Yes. I could not recommend it.

THE COURT: All right.

You will be excused, Mr. Mays. Mr. Maloney, I assume you wish the same objection to apply to him.

MR. MALONEY: Yes, Your Honor.

THE COURT: So recorded.

(Mr. Mays was excused from the jury box.)

* * * *

THE COURT: Do either of you know of any reason why you couldn't sit as a fair and impartial jurors in this case?

MR. PURCELL: No.

MR. O'BRY: No.

THE COURT: Do either of you hold such strong moral or religious conscientious principles in opposition to the imposition of the death penalty that you would be unwilling to recommend the imposition of the death penalty regardless of the evidence?

MR. PURCELL: No.

MRS. O'BRY: No.

* * * *

THE COURT: Do either of the three of you hold such strong religious, moral or conscientious principles in opposition to the imposition of the death penalty that you would be unwilling to vote to recommend the death penalty regardless of what the evidence was?

MR. CARHUFF: No, sir.

MR. SCHNEIDER: No, sir.

MRS. LUCKER: No, sir.

* * * *

THE COURT: * * *

Ms. Carn, the fact your husband for a while was a police officer and the fact that we have here listed as witnesses many police officers and deputy sheriffs conceivably could raise a little bit of a problem. Do you think that because of your husband's previous occupation that you might be a little inclined to give what the officers say more weight than you would any other witness you didn't know?

MS. CARN: I don't think that would; but I do not believe in capital punishment.

THE COURT: The question isn't, ma'am, whether you believe in capital punishment or not; the question is whether or not you have such a strong disbelief in it as to make it unable for you to vote to return a recommendation of the death penalty regardless of what the evidence might be.

MS. CARN: That's right.

THE COURT: All right, ma'am. Then we will excuse you then right now. I appreciate your candor.

MR. MALONEY: Your Honor, once again I object. I don't think that is relevant.

THE COURT: Objection will be noted.

(Ms. Carn was excused from the jury box.)

* * * *

THE COURT:

I have asked the others and I will ask each of the four of you whether you have such strong religious, conscientious or moral principles against the imposition of the

death penalty that you would be unwilling to vote to return a recommended sentence of the death penalty regardless of what the evidence or the facts might be?

Would you Ms. Pigeon?

MS. PIGEON: Yes, sir.

THE COURT: Mr. Wall?

MR. WALL: No, sir.

THE COURT: How about you, Ms. Maher?

MS. MAHER: Yes, I do have such convictions. I am a Seventh Day Adventist.

THE COURT: And no matter what the evidence showed you don't think you would vote for it?

MS. MAHER: I couldn't, sir.

THE COURT: Very well, over the objections of the defendant she will be excused.

(Ms. Maher was excused from the jury box.)

THE COURT: How about you, Mr. Parker?

MR. PARKER: No.

* * * *

THE COURT: All right. Mr. Embach, do you have such strong religious or moral or conscientious principles in opposition to the death penalty that no matter what the evidence is you would not be willing to vote to return a verdict?

MR. EMBACH: No, sir.

THE COURT: Recommending it.

MR. EMBACH: No, sir.

THE COURT: Fine, sir.

* * * *

THE COURT: Do you have such strong religious or moral or conscientious principles in opposition to the death penalty that you would be unwilling to recommend, no matter what the facts were, you would be unwilling to recommend the death penalty to the Court?

MR. LORD: No.

* * * *

THE COURT: Do you have such strong principles in opposition to the death penalty under no factual situ-

ation would you be willing to vote to recommend to the Court the imposition of the death penalty?

MR. HUDSON: No.

* * * *

THE COURT: Do you have any religious, moral or conscientious principles against the death penalty that are so strong that you would be unwilling to vote to recommend the death penalty regardless of what the facts might be?

MRS. MAYS: No, sir.

* * * *

THE COURT: Do you have any opinions or principles in opposition to the death penalty that are so strong that it would make it impossible or very difficult for you to vote to recommend a verdict of a death sentence regardless of what the facts might be?

MR. STAHA: No, sir.

* * * *

CLERK: Theodore T. Murphy. Number 87.

(Mr. Murphy was seated in the jury box.)

THE COURT: Mr. Murphy, what is your occupation?

MR. MURPHY: Retired.

THE COURT: What did you do prior to retirement, sir?

MR. MURPHY: Several jobs. I was eight and a half years in the administration office in a seminary, before that I was thirty years with the utilities.

THE COURT: What seminary were you with, sir?

MR. MURPHY: St. Pios, Uniondale, New York.

THE COURT: Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?

MR. MURPHY: Yes, I have.

THE COURT: All right, sir, you will be excused then.

(Mr. Murphy left the jury box.)

* * * *

THE COURT: If the facts justify it would you have no such principles in opposition to the death penalty that you would be unwilling to vote to recommend the death penalty?

MRS. MULROY: Depending on the evidence.

THE COURT: Yes, ma'am.

* * * *

THE COURT: Do you hold any religious, conscientious or moral principles which are opposed to the death penalty, which feelings are so strong that you would be unwilling to recommend the death penalty?

MR. MACHETT: No.

* * * *

THE COURT: Do you hold such strong principles in opposition of the death penalty that you would be unable without violating them to recommend them, recommend a death penalty to the Court?

MR. ADKINS: No, sir.

* * * *

[IV; 199-287]

[TESTIMONY OF HELEN TURMAN]

HELEN TURMAN, having been produced as a witness on behalf of the State and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. McDANIEL:

* * * *

Q. All right. Mrs. Turman, on that [September 8, 1973], did something happen?

A. Yes, sir.

Q. All right. Start and tell the Jury what happened on that date?

A. At somewhere between 5:00, 5:30 and 6:00, I can't remember the time, this colored man came—was in the store, as I was—

Q. Let's start just before that, Mrs. Turman, please. Was your husband—where were you at five o'clock or so?

A. I was in the store.

Q. Was anyone with you?

A. No, sir.

Q. What happened at that time?

* * * *

A. As I opened the back door on the store, a colored man stood at the door. He says, "Oh, there you are." I says, "Yes, sir, what can I help you with?" He says, "I want to look at some furniture and I want approximately $600 worth of furniture for some furnished apartments," rooms or apartments.

Q. Was anyone with you?

A. I was alone.

Q. Was anyone with him?

A. No, sir, I did not see anybody.

Q. Then what happened?

A. I proceeded to show him the furniture. He looked at two couches, bedding.

Q. Tell the Jury, describe to the Jury for them, the type of building and type of business it was.

A. The back part of the store was frame.

Q. Frame?

A. Frame. It was dark back in there, and the front part of the store was concrete block.

Q. What kind of door was on the front?

A. On the left hand, well, entering the store, it would be the right-hand side of the door—of the store is a large, sliding door. It slides up overhead.

Q. Yes, ma'am.

A. And then the glass door where you enter is a sliding glass door which slides to the side. Then there is a big window on the other side.

Q. All right, any other doors?

A. There is, in the other end is another large, sliding, loading door that slides overhead.

Q. All right. What were the lighting conditions in the front part of the store?

A. Very poor.

Q. In the back part?

A. Very poor.

Q. Did you have any lights on?

A. I did have some lights on, but not all.

Q. Do you have an office in the building or in the store?

A. I had my desk setting just inside the frame part of the building from the concrete block part.

Q. All right. You said that this man asked you or told you he wanted to buy about $600 worth of furniture for apartments?

A. For furnishing for furnished apartments.

Q. For furnished apartments?

A. Yes.

Q. And he asked you for something specific?

A. Bedding, couches and ranges.

Q. All right, then what happened?

A. I proceeded to show him what I had. I showed him the bedding and the couches. Somehow I had neglected to take him into the room where the ranges were.

I thought he had left. He said his wife would be back; and I went, started back into the back of the store again, back where my desk was, when he returned and said he would like to see the ranges, the stoves.

Q. The same man, ma'am?

A. Yes, sir.

Q. All right.

A. I'd taken him over to where the stoves were and showed him and he pointed out two stoves and he told me not to forget to show those two to his wife when she came.

Q. Go ahead.

A. And so he asked me the price or what—if I could total that up. And I said I can go to my adding machine and total it up and give you what that totals. And, as I turned my back and started out, I got out to where a mahogany Duncan Phyfe table was sitting with chairs on it when I felt the gun hit my back. And he held my right arm here. He says, "Do as I say and you won't get hurt."

Q. All right, what happened next?

A. He reached out with his other hand with the gun and pulled the loading door down with the gun and then asked for the key to the glass door. I said, "There is no key, I lock it with a stick." So he told me to fasten it and as I picked up the stick, he says, "Don't try anything funny." So I fastened the door.

Q. With the stick?

A. With the stick.

Q. All right, ma'am.

A. And then he taken me on back to the office and where the cash register was. He told me to open the cash register.

Q. Was it locked?

A. No.

Q. Okay. Did you open it?

A. I opened it.

Q. What happened?

A. He told me to back up with my back against the refrigerator. He taken the bills out, did not bother the change, the silver.

Q. Do you know how many bills he took out?

A. Not exactly, but I will say not more than $15. I don't know how much I had.

Q. Are you positive it was at least one dollar?

A. I am.

Q. Then what happened? What did he do with the money, ma'am?

A. He stuck it in his pocket.

Q. Did he still have the gun at that time?

A. Yes, sir.

Q. Do you know which hand he had the gun in?

A. I don't know.

Q. At that time?

A. At that time.

Q. So he took the money out of the cash register himself?

A. Yes, sir.

Q. Put it in his pocket?

A. Yes, sir.

Q. Then what did he do?

A. He told me to go on toward the back of the store. I started around—I was getting weak in my knees. I thought I was going to fall. He told me to stand up and keep going. We got back to the back room of the store where I had box springs and mattress stacked against the wall. And about that time, my husband opened the door. When he reached across my right shoulder and I screamed, "No, Jim, don't come in," but it was too late. He had already fired the gun and shot my husband. My husband did not have a chance to say a word. He just threw his hands up like that and fell backward onto the ground.

Q. All you said to your husband at that time was "Jim, don't come in"?

A. Right.

Q. And your husband did not respond?

A. He did not respond.

Q. Did this man say anything to him?

A. No, sir.

Q. Were any other words said at all at that point?

A. Yes.

Q. Okay, what was that, ma'am?
A. He turned, he stepped in front of me and held the gun on me. He says, "Stand still, don't move."
Q. Who said this?
A. The colored man.
Q. All right.
A. While he held the gun on me, he reached out out the door, taken hold my husband's belt and pulled his head into the puddle of water there in the door. One leg was in the door, the other was up on the side of the building.
Q. All right.
A. This is the position my husband laid in on his back. He came back in and then he told me to go in the adjoining room where mattresses were stacked.
Q. Did anyone close the door, Mrs. Turman?
A. He did.
Q. Ma'am?
A. He did.
Q. Was he able to close it completely?
A. No.
Q. Why?
A. Because my husband's foot—one foot was in the door.
Q. Mrs. Turman, did your husband ever move or get up after the shot was fired?
A. No, sir.
Q. Do you know where the shot hit your husband?
A. Yes, sir.
Q. Where?
A. Between the eyes.
Q. All right, what happened then?
A. He told me to get down on the floor.
Q. Where was this, Mrs. Turman?
A. In the mattress room.
Q. How far is this from the back door where your husband was lying?
A. It's right at the back door.
Q. Can you estimate in footage?
A. About three foot.
Q. Did you get down on the floor?
A. I sat down on the floor.

Q. All right. Where you were sitting, how far was that from your husband's body?
A. Four to five feet.
Q. All right, go ahead. You say four to five feet?
A. Yes.
Q. What happened then?
A. I asked him to please let me go to my husband. He says, "He is all right. I only shot him in the shoulder." He told me to take my teeth out. I didn't have my teeth in.
Q. What was he doing at the time he told you to take your teeth out?
A. He was unzipping his pants and undoing his belt buckle.
Q. Then what happened?
A. I cried, "Lord, have mercy." And he taken his penis out and told me to suck it.
Q. What happened then, Mrs. Turman?
A. Again I cried, "Lord, have mercy." He told me to get up and he was taking me back toward the front of the store.
Q. Did he zip his pants back up?
A. I don't know.
Q. How long were you on the floor, do you know?
A. Just a few minutes or seconds. I was too scared to even estimate the time.
Q. What happened then?
A. As we got halfway back up through the building by a sewing machine I had out, had been sewing that day, as we got there, Phillip Arnold, a part-time employee, he hadn't worked for two or, I'd say, approximately two months or a little more.
Q. Where does Phillip live?
A. Two doors from us. When he came and shoved the back door open.
Q. Where were you and this man at that time when he shoved the back door open?
A. By the sewing machine.
Q. All right, was this in a direct line?
A. It was in a direct line of the door.

Q. Direct line from the back door?
A. Yes, sir.
Q. All right, what happened then?
A. I screamed "Phillip, no. Go back, go back." At that time he left me and run to Phillip.
Q. Who left you?
A. The colored man.
Q. Go ahead.
A. And I heard sort of a click of a gun which was a misfire and then I heard a shot and I saw him shoot Phillip in the face.
Q. Then what happened?
A. Phillip run and he proceeded to run after Phillip, and I turned and ran to the phone and dialed the operator, give my name and my address, told her what had happened and for her to please call the sheriff for me. And I hung up and went back to my husband's side.
Q. Did you see Phillip at that time?
A. The last I saw of Phillip before he was put in the ambulance was when he was running across the yard and running back toward some houses back of us.
Q. All right. You said a moment ago that Phillip was in the back door which is the same back where your husband was lying half in and half out?
A. Right.
Q. You said that Phillip opened the back door?
A. Yes.
Q. What was Phillip doing at the time he opened the back door? Could you see him then?
A. I saw him. That's when I screamed to him. He didn't know what was going on.
Q. Did you hear Phillip say anything?
A. I did not. He said he did, but I did not hear it. I was too frightened and screaming for him to go back.
Q. Was he running at that time, ma'am?
A. Yes, sir.
Q. You say you saw Phillip over your husband's body?
A. I did.

Q. The man walked from the back room, from you, and you heard a click and the man shot Phillip in the face?
A. Yes, sir.
Q. How many shots did you hear there at the body?
A. Three—two.
Q. Click and shots, ma'am, which?
A. One click and two shots.
Q. That was at the body?
A. Yes, sir.
Q. Did you hear any other shots?
A. I did not. Evidently the other one which I was told was fired.
MR. GOODWILL: I object, Your Honor.
THE COURT: Objection sustained, as to what you have been told.
Q. You did not hear another shot?
A. I did not.
Q. You heard a click and two shots while Phillip was over your husband's body?
A. Right.
Q. Mrs. Turman, I want you to look around the courtroom today and see if you see this man.
MR. MALONEY: Your Honor, I object and request the Jury be excused for the purpose of a motion.
THE COURT: All right. I will allow your request. Mr. Bailiff, if you will take the Jury out for a minute.

(The Jury left the courtroom.)

(JURY OUT)

THE COURT: All right.
MR. MALONEY: Your Honor, I would move to suppress the identification of the Defendant by this witness on the grounds that the identification subsequent to the arrest of the Defendant by this witness was tainted.
THE COURT: On what basis, sir?
MR. MALONEY: I think, sir, that there is standard procedure which should have been followed in the interest of fairness, were not followed here and I would re-

quest the Court to allow me to ask Mrs. Turman a few questions.

THE COURT: All right, sir. Proceed.

EXAMINATION

BY MR. MALONEY:

Q. Mrs. Turman, when is the next time that you had occasion to see the man who was in your store?

A. The day after the funeral.

Q. Do you remember why you were there?

A. To identify him.

Q. Was this at a hearing or did they take you to the police station?

A. To a hearing.

Q. Do you know if that was a preliminary hearing?

A. Yes, sir.

Q. And that was the first time that you had seen him after the store?

A. Yes, sir.

Q. Do you remember a man named Richard Mars who was an assistant State attorney there that day?

A. Yes, sir.

Q. Do you remember a man named Gerald Hill?

A. Yes, sir.

Q. Before this hearing, had the police shown you any photographs?

A. No, sir.

Q. Before the hearing, had you had occasion to see the man in what is commonly known as a lineup?

A. No, sir.

Q. I realize that you must have been quite upset by this, but did you read the papers regarding this incident?

A. No, sir, I have never yet even to this day read the account of my husband's death.

Q. All right, ma'am.

MR. MALONEY: Your Honor, I'd like to draw the Court's attention to the preliminary hearing and the identification which Mrs. Turman has stated the first occasion to see the person who was in the store afterwards. The identification, in my opinion, was tainted at the preliminary hearing.

"Question by the Court."

MR. McDANIEL: Your Honor, I object unless Mr. Maloney—the proper way to do it is ask the witness if a certain question was asked and if a certain response was given, if he is going to impeach a witness; but not testify yourself from a transcript.

MR. MALONEY: Your Honor, I'm not attempting to impeach this witness, I am merely saying that the procedures followed were inadequate.

MR. McDANIEL: Then that's up to you to prove it, not for the Court to allow you to testify from a transcript.

MR. MALONEY: Would the Court take judicial notice or would the Court read this transcript or allow me to read it into the record?

THE COURT: Yes, sir. I assume that's a transcript prepared by an authorized court reporter?

MR. MALONEY: Yes, sir, it is. Alice D. Wren.

MR. MALONEY: Statement by the Court, Judge Strickland.

MR. McDANIEL: Your Honor, would you allow him to tell the Court who the Plaintiffs were at that time?

MR. MALONEY: The players at that time were Judge Strickland, Mr. Richard Mars and Mr. Gerald Hill. On the stand was Mrs. Turman.

THE COURT: All right, sir.

MR. WHITE: Mr. Maloney, what page are you on now?

MR. MALONEY: I am on Page 7. Judge Strickland asked her to identify "Mr. Mars, Answer, Yes, sir."

Mr. Mars says then, "Can you see the man sitting here?" At that point, Mr. Hill "Your Honor, I'm going to object to this type of identification."

THE COURT: Was Mr. Hill representing the Defendant?

MR. MALONEY: Yes, Your Honor, he was.

THE COURT: All right, sir.

MR. MALONEY: "The Court: I am not—sit down." Your Honor, I believe that the police had the man in custody hours after this.

THE COURT: I didn't quite follow that colloquy.

MR. GOODWILL: Your Honor, that was part of the reason for the objection. Bits and pieces can be reconstructed of what occurred.

MR. McDANIEL: Only from the transcript, Your Honor.

MR. GOODWILL: Or from the testimony of Mrs. Turman.

MR. McDANIEL: Right.

THE COURT: I read the balance of the colloquy as follows: "Mr. Hill: Your Honor, I am going to object to this type of identification.

"The Court: Not under these circumstances, Mr. Hill.

"Mr. Hill: Judge, even as Defense attorney, that shows no respect for the Court, much less for the Court.

"The Court: I appreciate it.

"Mr. Hill: The objection I want on the record.

"The Court: I appreciate that. It's on the record. This woman has had a traumatic experience, Mr. Hill.

"Mr. Hill: Judge, I appreciate that. I still have an obligation to my client.

"The Court: I appreciate that. If you want to be—if you want to be held in contempt, you pardon me. All right, go ahead."

MR. MALONEY: Yes, sir.

THE COURT: All right, what is your position?

MR. MALONEY: Your Honor, I think this—in this case, in a case such as this where eyewitness identification is so important, the police could have exercised and they should have exercised more fair procedure. The man was in custody. They could have had a lineup in which six men of his same race, same general height, general build, general age were used and allowed the woman to pick him out of the lineup. If that were too traumatic, they could have used a photograph lineup as they did in another occasion. But they didn't do that either. Instead, they waited for a preliminary hearing some days later when the Defendant was the only black man in the room.

MR. McDANIEL: Objection, Your Honor. That's an assumption on Mr. Maloney's part.

THE COURT: Yes, sir.

MR. McDANIEL: Move to strike it, Your Honor.

THE COURT: The objection will be sustained. Go ahead, sir.

MR. MALONEY: Your Honor, I realize that this is not on testimony. I was in the room at the time.

THE COURT: Go ahead, sir.

MR. MALONEY: In short, Your Honor, we move the identification be suppressed on the grounds that the identification which the lady is about to make now quite possibly was made from the identification at the preliminary hearing, and that identification was tainted because Mr. Jordan was the only black man in the room and because Mr. Mars pointed out the man and said—

MR. McDANIEL: Objection, Your Honor. This is not in the transcript, at least my recollection of the transcript.

MR. GOODWILL: Your Honor, would you allow Mr. Maloney to go ahead and finish his argument and then if Mr. McDaniel has objections to it, he certainly would have an opportunity to present it to the Court.

THE COURT: No, sir. Mr. McDaniel, I will make—

MR. GOODWILL: The constant interruptions—

MR. McDANIEL: I'm not objecting to his argument. I am objecting to his testimony.

THE COURT: No, sir, I'm going to allow him to object any time he thinks it necessary. Go ahead, sir.

MR. MALONEY: I think Mr. Mars said, "Can you see the man sitting here?" I was in the room. He pointed at the man and said, "Can you see the man sitting here?" The only black man in the room and from that identification, the man was—

THE COURT: All right, sir, Dennis, assuming that all this will be—could be proved, I will still not sustain your motion. What the State could have done or could not have done, or what the enforcement officers could have done or should have done are matters to go to the believability of the identification and proper matters for

consideration by the Jury. They don't go to the admissibility of identification and they do not render it inadmissible. So I will overrule, deny your motion, overrule your objection.

MR. McDANIEL: Your Honor, may I ask one question of the Court?

THE COURT: Yes, sir.

MR. McDANIEL: Mr. Maloney testified that, in his testimony that the police did this and the State did this. My recollection—I don't have a copy of the transcript—this is the Court doing this, is it not?

THE COURT: Partially the Court and partially the State attorney, assistant State attorney.

MR. McDANIEL: Thank you, Your Honor. Are you ready, Your Honor?

THE COURT: Yes, sir. All right, Mr. Bailiff, bring in the Jury.

(The Jury returned to the courtroom.)

(JURY IN)

* * * *

DIRECT EXAMINATION (Continued)

BY MR. McDANIEL:

Q. Mrs. Turman, my last question to you was, I asked you to look around the courtroom and tell me and tell the Jury whether or not the man that was in your house on that particular date, the colored man that murdered your husband, is in the courtroom today. Can you do that?

A. Yes, sir.

Q. Is he in the courtroom?

A. He is.

Q. Would you point him out to the Jury, please?

A. Right there.

Q. Are you pointing to the man at the end of the table?

A. Yes, sir.

MR. McDANIEL: Let the record show that the witness identified the Defendant.

Q. Mrs. Turman, I want you to look at the man very, very, very carefully.

A. Yes, sir.

Q. Is there any question in your mind whatsoever?

A. None.

Q. Does he appear the same as he did on September the 8th?

A. No, sir.

Q. What, if anything, has he done since that date?

A. He has growed a goatee and his hair is not combed down like it was. It's more bushed out. He was very clean shaven, appeared very intelligent, and at first talked very intelligent.

Q. Mrs. Turman, after the September 8th, until today, have you seen Mr. Jordan?

A. The day after the funeral, as I said.

Q. Do you remember when the funeral was?

A. Yes, sir, September 13th, on a Wednesday.

Q. You say you saw Mr. Jordan the day after?

A. Yes, sir.

Q. Where was that?

A. At the preliminary hearing.

Q. Did you have any trouble identifying him on that date?

A. I did not.

Q. And again, you're absolutely positive?

A. Yes, sir.

Q. All right. Have you seen Mr. Jordan since that date until today?

A. No, sir.

Q. Have you seen him in the Courthouse—how long have we been in trial now—yesterday?

A. I did not.

Q. Or today?

A. Not until I come in this room.

Q. Mrs. Turman, on September the 8th, would you describe if you can how Mr. Jordan was dressed?

A. Very neat. Color, I cannot—but he was neat.

Q. Did he have a suit on?

A. I don't recall whether it was a complete suit or whether it was sports clothes—he did have a sport shirt with a stripe around the neck.
Q. What kind of sport shirt are you talking about?
A. A pullover.
Q. Pullover?
A. Pullover.
Q. And what was around the neck?
A. A stripe.
Q. Do you recall whether he had glasses on that day or not?
A. No glasses.
Q. Do you recall whether he had a hat on?
A. No, sir.
Q. You don't recall, or he did not?
A. He did not.
Q. Do you recall his pants?
A. No, I don't recall the color, no, sir.
Q. Can you remember whether they were light or dark?
A. They were dark, but the color, I don't know.
Q. Were they solid, or some other?
A. Solid.
Q. Do you remember he had any shoes on or anything he had on?
A. I did not look.
Q Do you know if he was barefooted, or do you know?
A. I don't know.
MR. McDANIEL: Excuse me a minute, Your Honor.
THE COURT: Yes, sir.
MR. McDANIEL: Your Honor, may the attorneys approach the Bench?
THE COURT: Yes, sir.

(The attorneys approached the Bench.)

(A discussion was held at the Bench as follows:)

MR. McDANIEL: I am fixing to bring the gun out marked for identification. She cannot identify the gun. I want to show her the gun and ask her if it is the same

size, but she is not able to identify it as being the gun.
MR. GOODWILL: Do you want—
MR. McDANIEL: Do you want to object now or later?
MR. GOODWILL: If she can't identify the gun, what is the relevance for them to see it? It would only prejudice them, that's the only reason for doing it at this time.
MR. McDANIEL: Well, I will withdraw it.

(The attorneys left the Bench.)

Q. Mrs. Turman, you testified earlier that Mr. Jordan had a gun. Did he have more than one gun?
A. I only saw one.
Q. All right. Would you describe that gun to the Jury to the best of your ability?
A. To the best of my ability, it was a hand gun.
Q. What do you mean, hand gun?
A. I don't know one gun from another. I am not acquainted with guns. It was a hand gun. It wasn't a long rifle.
Q. All right. Could you estimate the entire length of the gun he had in his hand with your hands ma'am?
A. That would be really hard to say, but maybe—
Q. The entire length of the gun?
A. I think so.
Q. All right. Do you recall the color?
A. It looked dark.
Q. Dark?
A. Yes, sir.
Q. That's all you remember?
A. Yes, sir.
Q. Anything else distinguishing about the gun Mr. Jordan shot your husband with?
A. No, sir.
Q. No, strike that.
MR. McDANIEL: May I have a moment, Your Honor?
THE COURT: Yes, sir.
Q. Mrs. Turman, between the time your husband was shot and the time you saw Mr. Jordan at the preliminary

hearing, did you have an occasion to see any newspaper articles where Mr. Jordan's photograph was in that article?

A. I did not.

Q. Did you read any newspaper article?

A. I did not. I was too upset making funeral arrangements. I did not read a paper and have not yet to this day read a paper in the State of Florida. While I was back in West Virginia, I did read some papers, but there was nothing in West Virginia papers about it.

Q. Mrs. Turman, between the day your husband was murdered and the preliminary hearing, did any police officers or anyone else show you any photographs?

A. No, sir.

Q. Until this day, has anyone attempted or shown you a photograph of this Defendant?

A. No, sir.

Q. Can you estimate approximately how long Mr. Jordan was in your presence in the store?

A. I'd say about ten minutes.

Q. Would that be before and after your husband was killed?

A. Yes, sir.

Q. All right. Do you have any question in your mind that this is the man that murdered your husband?

A. None.

MR. McDANIEL: I have no further questions.

THE COURT: All right, I think we will take a recess before you cross-examine. Everyone rise while the Jury's excused.

(There was a brief recess and Court reconvened with the same appearances.)

THE COURT: All right, Mr. Bailiff, bring the Jury in. Will everyone rise while the Jury comes in.

(The Jury returned to the courtroom.)

(JURY IN)

CROSS-EXAMINATION

BY MR. GOODWILL:

Q. Mrs. Turman, Do you remember me from taking your deposition sometime back?

A. Yes, sir.

Q. There's some questions that I want to ask you as far as events of that day, which I realize from our prior encounter are most difficult for you to testify. In order to make sure that all points have been covered from both the standpoint of the prosecution and of the defense. Do you recall immediately after this very unfortunate event occurred, speaking to an Officer Don Neil with the Polk County Sheriff's Department?

A. I don't recall all names.

Q. And do you recall an officer taking a statement from you?

A. Yes, sir.

Q. Probably on a tape recorder?

A. Yes, sir.

Q. Do you recall what your description of the man that had committed these acts was at that time or what the description was that you gave him at that time?

A. I recall telling him as for giving a definite description, I am a poor hand at doing it; but I do remember faces. But to describe someone I can't really do it.

Q. Okay. Isn't it true that you have made the statement both to Mr. Neil and in a subsequent deposition that you really don't pay that much attention to customers when they come in?

A. I did make that statement that I don't pay that much attention to how they are dressed or anything, but faces I do remember. I remember my customers.

Q. All right. Now what time did you say that Mr.— that this man came into your store the first time?

A. Between 5:30 and 6:00.

Q. All right. Do you recall telling Officer Neil that it was six o'clock or possibly a little after?

A. I don't recall saying after.
Q. Is it possible, though, it was six o'clock more than 5:30, closer to six o'clock?
A. It's possible.
Q. What was the first thing that you showed this individual when he came into your store?
A. The bedding back where he was standing at the door when I came in, which is where the bedding is at.
Q. Do you recall telling Officer Neil that the first place you went was to the stove room?
A. No, sir, first place I went after leaving the bedding was up by some couches.
Q. Did this individual seem to be paying attention to what you were showing him?
A. Yes, sir.
Q. Did he inquire?
A. Yes, sir, he was looking at the best ones I had in the store.
Q. Did he inquire about price or quality or anything of these sorts which is the normal, I assume the normal for furniture store?
A. No, sir, he didn't.
Q. What did he ask?
A. He just looked at them and as I usually advise my customers on rental that it isn't a good idea to buy the very best because people, which I told him, people don't really take care of someone else's property.
Q. All right. The first thing you showed him was some couches and some beds?
A. Beds first because that's where I came in and that's where the bedding was, the box spring and mattresses. And then up in front, I taken him to the front of the store where the couches were.
Q. All right. As you walked through the store at that portion of the time, where was the man in relation to you? Was he walking alongside of your or in front of you or behind of you or where?
A. I don't remember.
Q. Had you ever seen him in your store before?
A. No, sir.

Q. Then would it have been natural for you to lead him through the store?
A. Most usually it would be, but since he had already made his way first from the front of the store to the back of the back door before I came in, then I believe I said the couches are up in the front, if you care to go.
Q. Do you know if he touched anything while he was looking at the couches?
A. No, sir.
Q. Do you know that he didn't?
A. I don't know that he didn't.
Q. All right. Do you recall what your description to Officer Neil was as far as this man's face was concerned?
A. I don't remember, no, sir.
Q. Do you remember whether or not the man had glasses on?
A. He did not have glasses on.
Q. Do you recall Officer Neil asking you the question whether or not this man wore glasses?
A. I don't recall.
Q. Was your answer that he did not wear glasses?
A. He did not wear glasses.
Q. All right. Now the statement we're talking about was taken when in relation to the events of that afternoon?
A. That after my husband had been taken to the emergency room.
Q. In fact, this statement was taken while your husband was at the emergency room.
A. Either at or en route, but I was still being held at the store.
Q. Immediately after the event is when this statement that we are referring to was taken?
A. Yes.
Q. All right. Do you recall Officer Neil asking the following question which is from the statement on Page 6: "Question: Uh-huh, how about glasses? Did he wear glasses, do you remember?
"Answer: I don't remember." Was that your answer at that time?

A. Again, I will have to say I don't remember what my answer was that night. I was more or less in a state of shock.

Q. Okay. But today, assuming this is a correct transcription, you're saying that he did not wear glasses; but at that time, you didn't remember, which was immediately after the event?

A. Right.

Q. All right. Do you recall Officer Neil asking you about his general build?

A. I recall him asking me and I couldn't describe it.

Q. Let me ask you if your remember these questions and answers again coming from the statement you gave to the officers that night.

Question: "Uh-huh. Was he neat in his appearance, clean-looking, clean-shaven?

Answer: "As far as I can remember, yes, sir."

Question: "Did he talk with any kind of brogue or accent or anything like this?"

Answer: "No, sir; no, sir."

Question: "How about his facial features. Do you remember anything about it? Was it a slender face or a fat face, or—"

Answer: "I believe it was a fat face."

Question: "Kind of?"

Answer: "He himself was a heavyset man."

Do you recall that series of questions and answers?

A. Yes, sir.

Q. All right, at that time, did you describe the assailant as heavyset man?

A. Possible; yes, sir, I believe I did.

Q. Do you recall whether or not you were asked how tall the man was?

A. Yes, sir.

Q. Do you remember what your answer to that was?

A. I says taller than I am but exactly I couldn't say.

Q. Again reading from the same statement, do you recall this question? "Question: How old of a person do you think he is? I know it's hard to tell, but if you just make a guess for me.

"Answer: I would say approximately in his maybe early forties or late thirties.

"Question: Forty? And about how tall do you think he was?

"Answer: Well, he—

"Question: I am—

"Answer: I would say he is about my height, which is five six."

Do you recall giving those answers?

A. I don't recall that, but I do recall giving the age of either early—late thirties or early forties.

Q. Today you're saying your description of the man was that he was taller than you are; but that on this statement you said that he was about your height, is that correct?

A. As I said, I was in a state of shock. I can't remember exactly what I said that night.

Q. Okay, that's understandable. Do you recall being asked about his weight or general size?

A. I don't recall it.

Q. Do you recall responding that he was heavy, that he was around 200 pounds or over?

A. I don't recall.

Q. Have you had an opportunity since the time that you gave this statement to Officer Neil to read over a transcript of it?

A. No, sir.

Q. Has this transcript been discussed with you by the State Attorney's Office?

A. No, sir.

Q. Okay. Do you remember this question: "Do you think that if you saw this person again, you could identify him, say, out of a possible (it is not audible)"—apparently the machine was not audible—do you remember that question being asked to you at that time?

A Yes, sir, I do.

Q. Do you recall what you answer was?

A. I don't.

Q. Was your answer: "I would try, I would try; I might—I don't know. He did say that Jim owed him I don't know what. We don't owe anyone like that."

A. As I said, I don't remember my answer.

Q. Do you remember anything that you gave as an answer on this report?

A. I remember saying that he did say that we owed him, and I asked him what for and I would gladly pay him if I owed him.

Q. But I am talking specifically now about questions which were asked to you by the officer immediately after this event took. Do you recall what your answers were at that time?

A. I don't.

Q. Okay. After this man pulled a gun on you—I know it may sound ridiculous, but were you scared?

A. Yes.

Q. Were you too scared to look or know what was actually going on around you?

A. I was.

Q. Didn't you, or haven't you in the past made the statement that identification would be hard because at one point put your hands over your face and began to pray?

A. I did make that statement.

Q. Do you recall telling Officer Neil that you were too scared to look?

A. Yes, sir.

Q. I can certainly understand this. Again, it is not an attempt to pick on you but to make sure that—

MR. McDANIEL: Your Honor, I appreciate the argument, but I'd rather he ask questions than argue.

MR. GOODWILL: I don't believe I was arguing.

THE COURT: I don't think it was out of line. Go ahead, sir.

Q. Did you describe the gun to Officer Neil?

A. No, sir.

Q. Did you tell Officer Neil of the attempted perversion that the man tried to make you commit?

A. I don't recall.

Q. Is it possible that you didn't?

A. It's possible I didn't.

Q. If you didn't, can you tell me why you would not?

A. If I didn't, I would say it was because I was in such a state of shock that everything didn't come to my mind.

Q. Now you say when Phillip came in, was the door open or shut?

A. It was shut. Phillip pushed the door open.

Q. Do you recall telling Officer Neil that the door was open when Phillip came in?

A. No, sir.

Q. After Phillip had been apparently shot, was your testimony that you called someone on the phone, on the telephone?

A. I dialed the operator.

Q. Okay. What did you say to her?

A. I gave her my name, address, told her what had happened and please call the sheriff's office for me.

Q. All right, then what did you do?

A. After that I called my sister, Mrs. Fulgrave, told her what had happened, and that I needed her. And I called my pastor.

Q. And is it correct, say, that at this time your husband was still laying outside in the rain and you had not gone to him at this point?

A. I had gone to him and then went back to the phone to call them. I went to him to check to see if he was still alive or not.

Q. Did you tell Officer Neil this?

A. I don't recall.

Q. Do you recall whether or not you told Officer Neil that you called your sister and your pastor?

A. I did tell him that I called my sister and my pastor.

Q. Are you absolutely certain of that?

A. Yes, sir, they were there when he arrived.

Q. During the time that he was taking this statement you told him this? You told him that you called your sister and your pastor.

A. Yes, sir.

Q. Do you recall Officer Neil asking the following questions and the following responses being given by you?

MR. McDANIEL: What page are you on?

MR. GOODWILL: Page 4.

Q. "Question: Uh-huh. How many shots were fired, do you know?

"Answer: One, one at my husband, two I know at Phillip at the back door, and I don't know how many after they left here, because I came back inside, dialed the operator, give my address, and told her there was a shooting and a holdup here, and for her to please call the sheriff's office.

Question: Uh-huh. What happened after that?"—excuse me—"What happened after then?

"Answer: I went back out to stay with Jim until help came." Is that correct?

A. That's correct.

Q. How long did you say this man was in the store total time?

A. Approximately ten minutes more or less.

Q. Well, more or less?

A. Well, when you are in a state of shock, you're not watching your watch or clock.

Q. No, ma'am, I am asking you now to tell me, if you can, as precisely as you can, how long this man was in the store.

A. Ten minutes.

Q. Now this includes both times he was in the store?

A. I can't remember distinctly.

Q. Okay. Could it have been longer?

A. It could have been.

Q. All right. Didn't you, in fact, tell the police officer that he, the man came in and you showed him the sofas and the bedding and then he left?

A. Yes, sir.

Q. All right, when he left, what did he say, if anything?

A. That his wife would be back, would be in later.

Q. All right. And then what did you do?

A. I turned to go back to my desk.

Q. All right, and how long was it before you saw him the next time?

A. He came right back in.

Q. Immediately?

A. Yes, sir.

* * * *

Q. Did you watch him at all times he was in that room?

A. No, sir, I did not.

Q. Okay. So at this point, there was really no cause for alarm?

A. No, sir.

Q. As far as you were concerned?

A. No, sir.

* * * *

Q. All right, ma'am. Do you recall coming into my office in Bartow back in October and my taking your deposition?

A. Yes, sir.

Q. Okay. Do you recall me asking you how the man was dressed at that time?

A. I do.

Q. I am talking about the time we took the deposition.

A. I do.

Q. You remember me asking that question?

A. Yes, sir.

Q. Do you recall what your answer was?

A. I told you I couldn't tell you the color of his clothes, but he had on this pullover—

MR. McDANIEL: Just a minute. The proper way to do it on a deposition is for Mr. Goodwill to read the question and the answer and ask if she made that response to that question. I'd like to have the page number when you do it.

THE COURT: For impeachment purposes it is proper, but I think this particular question was proper. I'm not sure it's impeachment. I want to know what conflicting statements he has got.

MR. GOODWILL: I am not.

THE COURT: You see what I mean? The only purpose of putting that in is if there is contradictory testimony today.

MR. GOODWILL: Yes, sir.

THE COURT: Otherwise she's just testifying to what she said, the same thing twice. I will allow your questions. Go ahead, sir.

Q. All right, sir. Do you recall me asking you on that at that time how tall he was?

A. Yes, sir, I do.

Q. Do you recall your answer?

A. No, sir, not precisely.

THE COURT: Now, sir, you may read your question and your answer.

MR. GOODWILL: Thank you. That's what I intended to do. Again, we are still on Page 3.

MR. McDANIEL: Okay.

Q. "Question: From his physical appearance, was he light or dark-skinned?

"Answer: Dark-skinned.

"Question: Okay.

"Answer: And I will say somewhere around five eight, maybe six foot tall; precisely I can't say." All right, this is different than what you told Officer Neil, isn't it?

A. Yes, sir.

Q. Did your memory get better or what accounts for the difference in the height description?

A. Well, as I said, that night I was in a state of shock.

Q. Wouldn't it also be true at that time that the image of this man would have been more vivid in your mind?

A. No, sir.

Q. Okay.

A. As anyone comes out of a state of shock, their memory gets more vivid.

Q. Approximately two months later, you are better able to make a description of the man than you were an hour after it occurred?

MR. McDANIEL: Your Honor, he is arguing to the witness now.

THE COURT: Yes, sir. The objection will be sustained.

Q. You were in a state of shock at the time of the preliminary hearing?

A. I was.

Q. But you made an identification then, didn't you?

A. I did.

Q. Now you're telling me a minute ago that the possible change or difference in the description between what you told Officer Neil and what you told me on deposition was because you were in shock, is that correct? This is understandable.

A. Right.

Q. But likewise, at the preliminary hearing, you have also told me you were in shock.

A. Still in a state of shock, but not as much as the night it happened. This was the day after the funeral.

Q. How many black men were in the room at the time of the preliminary hearing?

A. I don't recall.

Q. Do you recall seeing anyone in that room at the preliminary hearing other than this man right here?

A. I recall other people being there, but I can't say whether they were black or white.

Q. You said a few minutes ago you remembered Mr. Mars, is that correct?

A. As I said, I remember faces, but not names.

Q. The assistant State attorney.

A. Yes.

Q. Perhaps this is the way he was introduced to him. Do you remember him?

A. Yes, sir.

Q. Do you feel you could identify him from the preliminary hearing?

A. I think so.

Q. What about Mr. Hill?

A. Yes, sir.

Q. Your sister was with you at the preliminary hearing too?
A. My sister was with me.
Q. But you don't know whether or not there was another black man present in the room at the time you made the identification at the preliminary hearing?
A. No, sir, I don't.
Q. Do you remember Mr. Hill?
A. Yes, sir.
Q. The assistant public defender?
A. (Nods head.)
Q. Do you recall there being any black man sitting next to Mr. Hill other than this man right here?
A. No, sir.
Q. Do you recall Mr. Mars going to anyone else in the room, any other black man in the room, and asking if that was the person?
A. No, sir.
Q. So, at the preliminary hearing, this man was sitting at the defense table with Mr. Hill, and this is the man that Mr. Mars went to?
A. I don't recall him going to him.
Q. Then how did you identify him?
A. I looked at his face.
Q. Do you remember what questions were asked of you?
A. If the man was in the room who killed by husband.
Q. All right. Were you on a witness stand like you are now?
A. I was.
Q. Is this man sitting approximately the same as he is now relative?
A. He was sitting on the opposite side of the table of his attorney.
Q. All right. I mean, basically, from where you were sitting and looked out. Wasn't this pretty much the same arrangement?
A. Yes, sir.
Q. As the preliminary hearing?
A. Yes, sir.

Q. Do you remember seeing this man right here at the preliminary hearing?
A. He was sitting back close to where my sister sat.
Q. Okay. Now, we have gone through about five or six people that you do remember there, and you do remember this man being there. But, again, I ask you, do you remember whether or not there was another black person in that room?
A. No, sir.
MR. McDANIEL: Your Honor, she has answered that question at least three times.
THE COURT: Yes, sir. Objection will be sustained as being repetitious.
Q. Did Mr. Mars in any way make any indication to this man as to whether this man was the one that killed your husband?
A. I don't recall him making an indication of it.
Q. Do you recall Mr. Mars asking you the question at the preliminary hearing—
MR. McDANIEL: Give the page number.
MR. GOODWILL: Page 7.
Q. "Can you see this man sitting here?" Do you recall that question being asked?
A. No, I don't.
Q. You don't recall him asking you that question?
A. No, I don't.
Q. Page 8. Do you recall him asking you the following question and your giving the following answers?
"Question: Is this the man that shot your husband?
"Answer: Yes, sir."
A. Yes, sir, I do.
Q. Who was he referring to when he said do you see this man sitting here or is this the man that shot your husband?
A. He was referring to the man sitting right there.
Q. How did he refer to him? Did he go up and put his hand on his shoulder and say this man?
A. I don't recall it.
Q. But he didn't indicate anyone else in that courtroom other than this man right here, did he?
A. I don't recall him pointing to him.

Q. But he did in some way through the record of what was asked in the answers that were given indicate this man here?

A. I would say yes.

Q. You say you felt a gun in your back. How did you know it was a gun?

A. I didn't really know it was a gun until I saw it.

Q. When did you see it?

A. When he reached out to close the sliding loading door.

Q. Which hand did he have the gun in?

A. At that time I would say his left hand, because he still had hold of me and reaching out this way, he had hold of this arm.

Q. All right. So one door is already closed?

A. (Nods head.)

Q. We're talking about another loading door?

A. At the end.

Q. We're not talking about the glass door, but we're talking about the loading door.

A. Right.

Q. He reached out with the hand that he had the gun in?

A. And pulled it down with the gun.

Q. With the gun?

A. With the gun.

Q. And that's the first time you knew he had a gun?

A. Yes.

Q. And did that door make any noise when it came down?

A. No, sir.

Q. None at all?

A. No, sir.

Q. Silent?

A. Silent.

Q. Was he holding you in such a vice-like grip that you could not pull away from him?

A. Not a vice-like grip, no. He had hold of my arm here.

Q. And at the time you were at the metal loading door, couldn't you have pulled away from him?

A. It's possible, but he told me to do as he says and he wouldn't hurt me. He says, "Do as I say and you won't get hurt."

Q. You admitted this was a hand gun opposed to a rifle?

A. Yes, sir.

Q. Would you show me again about how big it was?

A. Maybe about like that.

Q. It wasn't a big gun or rifle.

A. No.

Q. Okay. Except for the statement to you that "Do as I say and you won't get hurt," were there any other threats of any kind made to you? In other words, did he threaten to kill you?

A. He did not.

Q. After he had shot your husband, did he threaten to kill you?

A. No, sir.

Q. All right. So we have got both loading doors closed?

A. (Nods head.)

Q. One that you know was closed by him and one you don't know who closed.

A. I don't know.

Q. Were—but it was closed sometime after he left the store?

A. Between the time he went out and then come back in.

Q. Okay. What about the sliding door?

A. He asked for the key to lock it. I said, "There is no key to that door. I have to lock it with a stick." The lock was broke on it.

Q. And then what occurred?

A. He told me to fasten it. I picked up the stick to fasten it and he said, "Don't try anything funny."

Q. Did he have hold of your arm the whole time you were picking up the stick?

A. No, sir, he didn't.

Q. He let go of you?
A. He let go of me while I did that.
Q. The sliding glass door was open?
A. It wasn't open, it was shut. But I had to open it a little bit to put the stick on the bolt there to fasten it.
Q. Okay. Do you know if he touched that sliding glass door at any time?
A. I don't know.
Q. Did he try to see if he could lock it or anything?
A. No, sir.
MR. GOODWILL: Page 10 of the deposition, Mr. McDaniel.
Q. Mrs. Turman, do you recall me asking you the question on the deposition "How long was he in the store before he left the first time?" And your answer: "I have no idea; maybe ten or fifteen minutes."
A. Yes, sir.
Q. Is that—to that question, would that be your answer today?
A. I say ten, fifteen.
Q. Before he left the first time?
A. No, I was combining the whole.
Q. All right. Again, the question was, "How long was he in the store before he left the first time?
Answer: I have no idea; maybe ten or fifteen minutes."
A. I am sorry. I must have misunderstood your question that day; but I thought you meant the entire time.
Q. Okay. Do you know what color the gun was?
A. It was dark. It was not a shiny gun, that's all I can say. I don't know guns. I don't know one gun from another. I don't know calibers or anything.
MR. GOODWILL: Page 11, Mr. McDaniel.
Q. Do you recall me asking you the question "Can you describe the gun to me?"
Answer: "No, sir, I can't."
Question: "What color was it?"
Answer: "I don't know, I was too scared to notice."
A. Yes, sir, I do recall that question.

Q. And that answer?
A. And that answer.
Q. Well, then, the obvious question is, do you know the color of the gun?
MR. McDANIEL: Your Honor, that is not impeachment. She testified the gun was dark. She has not testified to the color of the gun today. That's not impeachment of her on that date. She merely told in her statement she didn't know what color the gun was. She testified today it was dark. It's not something he's entitled to impeach on that statement.
THE COURT: The Jury heard the testimony. I will let it stand. Go ahead, sir.
Q. All right. After you closed the door, the sliding glass door, you all proceeded to the back of the store?
A. I told him while we were still at the door he could have the whole store, just please leave me alone.
Q. Did you tell Officer Neil that?
A. I don't recall.
Q. Do you recall telling me that?
A. I don't recall.
Q. While you were closing the door, he was behind you?
A. No, sir, he was in front me.
Q. In front of you?
A. Yes, sir.
Q. You could see him?
A. (Nods head.)
Q. What was the lighting conditions at that particular point in the store?
A. In front of that door for a cloudy day, it was fairly light. I did have one light turned on up there.
Q. Now, as you were going to the back of the room or—excuse me—to the back of the store, where was this man?
A. He was in back of me.
Q. Did he still have a hold of you?
A. He did.
Q. Which hand, if you know?
A. I don't recall.

Q. How did he have you? Did he have you by the right arm or the left arm?
A. I can't recall going back through there.
Q. All you do know is that he did have a hold of you?
A. And the gun in my back or between by shoulders.
Q. All right. You are assuming that it was a gun.
A. Yes.
Q. Mrs. Turman, your husband came through the back door in—or did he come in the back door?
A. He did not come in the door. He started in. He opened the door and started in. He did not get in.
Q. He opened the door?
A. He opened the door.
Q. All right. Was the shot instantaneously at that point?
A. It was.
Q. Did you hear your husband coming?
A. I did not hear him coming. I saw him opening the door and I screamed "No, Jim, don't come in."
Q. That's the first that you saw him?
A. Yes.
Q. And this man shot him instantaneously?
A. Instantaneously.
Q. Over your shoulder?
A. Over my right shoulder.
Q. At any time, did you observe this individual with gloves on?
A. No, sir.
Q. And after he shot, did you see Phillip actually get shot?
A. I did.
Q. You saw something to indicate that he was in fact hit?
A. I did, in the face.
Q. Okay. At that point, did this individual leave?
A. He run across the yard.
Q. And that day you never saw him again?
A. I never.
Q. Okay. You know how he left?
A. I do not.

Q. How did you get the money?
A. He told me to open the cash register and I did.
Q. Did he have a hold of you at this point?
A. No, sir.
Q. Where were his hands?
A. He was standing there with the gun pointing toward me and told me to open it.
Q. Was this on the counter, the cash register on the counter or anything?
A. No, sir, it wasn't. I had a dresser base there which I had my cash register sitting on.
Q. Did you see how this man left the scene?
A. I did not.
Q. Did you see any cars parked around your store?
A. No, sir.
Q. Although you haven't read any papers or looked at any papers, you did discuss newspaper articles with other people, didn't you?
A. No, sir.
Q. Didn't you discuss it with a friend of yours named Mrs. Poe?
A. She may—she just mentioned it to me, and I told her that I had not looked at a paper, that I couldn't read it.
Q. Did she mention that she had seen a picture of the man that they had caught?
A. She did.
Q. Okay. But you did not look at the paper?
A. I did not look at the paper.
Q. You did not see the person?
A. I did not look at the paper.
MR. GOODWILL: Excuse me just a minute, Your Honor.
THE COURT: Yes, sir.
Q. This may be repetitious. Did I ask you if you saw any cars parked around?
A. You asked me.
Q. I did? What was your answer to that?
A. I did not.

Q. Do you recall telling anyone that you saw a black car?

A. No, sir, I don't.

MR. GOODWILL: Page 4 of Officer Neil's statement.

MR. McDANIEL: All right.

Q. Do you recall the question being asked to you by Officer Neil, the officer that talked to you immediately after this occurred, "Did you see a car out front or anything?"

Answer: "I saw a car. I don't know if it was the one he was in or not, but it was out there at the corner of the building."

Question: "Uh-huh."

Answer: "The next time I looked, it was gone. That's all I know."

Question: "Can you describe this car to me in any way?"

Answer: "No, sir."

Question: "You don't?"

Answer: "I can't."

Question: "Uh-huh. Don't know what color it was?"

Answer: "No sir."

Question: "Uh-huh."

Answer: "I thought it was a black, I'm not sure."

Question: "Dark color?"

Answer: "It's a dark color, that's all I know."

A. I don't recall that.

Q. You don't recall saying that to Officer Neil?

A. I do not recall that, no, sir.

Q. At this time do you recall whether or not you saw a car?

A. I do not recall seeing a car.

MR. GOODWILL: May I have a moment, Your Honor?

THE COURT: Yes, sir.

MR. GOODWILL: I have no further questions of Mrs. Turman. I appreciate your answers. Thank you, ma'am.

THE COURT: All right, Mr. McDaniel, do you have redirect?

MR. McDANIEL: Yes, sir. I'd like to have a recess.

THE COURT: All right, we will be in recess for a few minutes.

(There was a brief recess and Court reconvened with same appearances.)

REDIRECT EXAMINATION

BY MR. McDANIEL:

* * * *

Q. . . . This morning you told me that Mr. Darden has grown his goatee.

A. Yes, sir.

Q. Allowed his hair to grow some since September the 8th?

A. Yes, sir.

Q. Would you look at his physical build and tell me whether there is any difference in it at this time.

A. Sitting down I can't really tell, but I can see the face.

THE COURT: Would the Defendant stand up?

(The Defendant stood.)

A. Yes, sir, he has lost some weight.

THE COURT: You may sit down.

(The Defendant was seated.)

Q. He has lost some weight?

A. Yes, sir.

Q. Mrs. Turman, the man—the pants he had on that night, were they as baggy as the pants he has on today?

A. I don't know—no, sir, I believe they were more tight-fitting.

* * * *

Q. You told Mr. Goodwill that you had your hands over your face, is that correct?

A. Part of the time.

Q. Did you have your hands over your face when you were showing Mr. Darden the furniture in the store?

A. No, sir.

Q. Did you have your hands over your face when he had you backed up to the refrigerator with the gun when he took the money out of the cash register?

A. No, sir.

Q. Did you have your hands over your face when you saw Mr. Darden shoot the boy in the face?

A. That is one time—after he had shot him—that I did throw my hands over my face.

Q. All right. In the little room four or five feet from your husband's body, when Mr. Darden was attempting to force you to have perverted act, or commit a perversion or perverted act, did you have your hands over your face at that time?

A. No, sir.

• • • •

Q. At the preliminary hearing—Mrs. Turman, let me ask you this question: Mrs. Turman, is this the man here that murdered your husband on September the 8th, 1973?

A. Yes, sir.

Q. This is the man here?

A. Yes, sir.

Q. Did I point to somebody when I said that?

A. You did not.

Q. You were questioned by Mr. Goodwill, do you recall whether Mr. Mars did as Mr. Goodwill did, pointed at him? Do you recall Mr. Mars doing that?

A. No, sir.

Q. Do you recall Mr. Mars going over, putting his hand on Mr. Darden?

A. No, sir.

Q. Was this in a courtroom, this preliminary hearing was being held in?

A. Yes, sir, a small one.

Q. A small courtroom?

Q. Was there a Judge there?

A. Yes, sir.

Q. Were there other people around the Judge?

A. I believe there was a clerk sitting down in front of me.

Q. Were there other people in the room?

A. There were a few other people in the room.

Q. All right. You don't recall whether there was another black man at that time or not?

A. I do not.

Q. At what point in time in that room did you recognize this Defendant as being the one that murdered your husband?

A. When I came in, I saw his face.

Q. Were you on the stand at that time?

A. I was on my way up to the stand.

Q. Had anyone questioned you at that time?

A. No, sir.

Q. Had Mr. Mars said anything to you at that time?

A. No, sir.

Q. Had anyone said anything to you at that time?

A. Nobody.

Q. You're telling the Jury that you recognized that man as being the one who murdered your husband before you ever reached the stand?

A. Yes, sir.

• • • •

Q. Mrs. Turman, after all of the examination this morning and cross-examination by Mr. Goodwill, can you look at that Defendant beyond and to the exclusion of all doubt and say that he is the one that murdered your husband?

A. I can.

Q. Is he the one that robbed you?

A. Yes, sir.

Q. He is the one that shot Phillip?

A. Yes, sir.

Q. Is he the one that attempted the act on you?

A. He is.

MR. McDANIEL: No further questions.

THE COURT: Recross, Mr. Goodwill.

MR. GOODWILL: Yes, sir, just a second.

RECROSS-EXAMINATION

BY MR. GOODWILL:

Q. Mrs. Turman, just a couple of questions. At that preliminary hearing that Mr. McDaniel and I both have been talking about, in your mind was there any question who Mr. Mars was referring to when he asked the question, "Is that the man that killed your husband?"

A. No. There was no doubt in my mind.

Q. As to who he was referring to?

A. Right.

Q. Prior to that preliminary hearing, had you been requested by any police officers or anyone from the State Attorney's Office to view a lineup or to take a look at this person to see if you could identify the man?

A. I had been requested to come down the day of the funeral. They didn't know that was the day of the funeral. They said that they would postpone it until the next day, so this is when I did go down.

Q. That was the purpose of the preliminary hearing?

A. Yes, sir.

Q. But to your knowledge, you were never requested—

A. No, sir.

Q. —to go down to a lineup?

A. No, sir.

Q. All right.

MR. GOODWILL: All right, no further questions.

MR. McDANIEL: I have no further questions.

THE COURT: All right, Mrs. Turman, you may step down.

(Witness excused.)

• • • •

[VI; 428-501]

[TESTIMONY OF PHILLIP ARNOLD]

PHILLIP ARNOLD, having been produced as a witness on behalf of the State, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. McDANIEL:

• • • •

Q. Did something happen on that evening, that day [September 8, 1973]?

A. Yes, sir.

Q. Would you tell the Jury what it was?

A. That was the day that Mr. Turman was killed that I was shot.

Q. Do you recall what day of the week it was?

A. It was on a Saturday.

• • • •

Q. Tell the Jury what you remember happening.

A. Well, I was sitting out on the front porch of my house, and my mother come out and told me that my dad—something had happened to Mr. Turman. She didn't say what it was, and for me to go help Mrs. Turman. So I run across, out the front door, run across my sister's front yard, down to the front drive. And then I run down the dirt road to the back. And then—

Q. All right. Would you step down and show the Jury your house the best you can.

(Witness left the stand.)

A. Okay. My house was right here. My sister was right here. And I run across her front yard to the drive here, and then I run down the dirt road like this and over to the back of the store.

Q. All right. How far would you say down the dirt road we're talking about?

A. I'd say approximately a hundred and fifty to 200 feet.

Q. All right. About what time was this?

A. It was around six o'clock.

(The witness returned to the witness stand.)

Q. P.M. or A.M.?

A. Well—

Q. Afternoon or morning?

A. Afternoon.

Q. All right. What was the weather condition?

A. It was still daylight, but it was a little cloudy.

Q. What did you find—what happened when you arrived at the back door?

A. Well, when I got to the back door, Mr. Turman was laying there with his feet partially up in the store, and his body was laying down in the water on the ground, and his head was bleeding real bad and all. And so then I reached—

Q. You say his head was bleeding real bad? Could you tell where it was bleeding from?

A. Right on his forehead.

Q. Could you tell the Jury—I know you are pointing, but we have a court reporter, and we have no way to indicate. You will have to tell me where you are pointing.

A. Right above the—kind of close to the right eye up on the forehead.

Q. All right. Was he face down or face up?

A. He was face up.

Q. You said his feet were inside the store?

A. Yes, sir, one foot was laying in the door and the other was up against the wall.

Q. Inside wall or outside wall?

A. Outside wall.

Q. What was the position of the door?

A. It was closed against his foot.

Q. Is there a screen door?

A. No, sir.

Q. Just the one door?

A. Yes, sir.

Q. All right, what happened then?

A. Well, I reached over Mr. Turman's body and pushed the door open.

Q. Were you standing at that time?

A. Yes, sir.

Q. All right, then what happened?

A. Well, I looked in the store, and Mrs. Turman and this man were standing about middle-ways of the store, more toward the front. And so I asked him to come help me get him up out of the water.

Q. Did either Mrs. Turman or this man say anything to you at that time?

A. Well, first, Mrs. Turman waved her hand at me and told me, "Phillip, go back."

Q. What do you mean, waved her hand?

A. Just like that, said, "Phillip, go back," like that, but I didn't know what she was talking about, so I didn't do nothing. So then I asked him to come help me get him out of the water.

Q. Did he respond to you?

A. He said yes or something to the effect, yes, sure, buddy, I will help you, like that.

Q. All right.

A. So then I squatted back down. I was squatted down over Mr. Turman. And then I looked back up, and the guy was standing there in front of me. And then I looked down to his hand, and he had a gun. And before I could say anything, he started shooting me.

Q. Let's go back now, son. You say you were kneeled down over Mr. Turman?

A. Yes, sir.

Q. You say kneeled, or how were you physically? Come down and show the Jury how you were over the man, over the body.

(Witness left the witness stand.)

A. Okay, I was squatted down just like this over Mr. Turman. His feet were up here, and his head was right here. The door was there, and I was squatted down just like this.

Q. All right. I want you to stay there.
A. Okay.
Q. All right, you said that—did you squat down before you pushed the door open at all?
A. Just for a second.
Q. And then you said you stood up and pushed the door open?
A. Yes.
Q. And that's when you saw Mrs. Turman and the man inside the store?
A. Yes, sir.
Q. And she told you to go back?
A. She said, "Phillip, go back."
Q. And you asked him to help you do what?
A. Get him up out of the water. His head and all was laying in the water.
Q. He said sure, buddy, I'll help you?
A. Yes, sir.
Q. You did what then at that point?
A. Well, I looked back down at Mr. Turman to see if he was breathing or anything for a minute. And when I looked back up—
Q. How were you when you looked at him to see if he was breathing, like you are now?
A. Yes, sir. I never got out of this position right here from looking up. I looked back down like that.
Q. Then what happened?
A. Then when I looked back up in the door, he was standing in the door; and when I looked down to his hand, and he a gun.
Q. Where did you look first?
A. Up at his face.
Q. And then you looked down?
A. Yes, sir.
Q. You saw the gun?
A. Yes, sir.
Q. What was the first thing happened then?
A. He pulled the trigger.
Q. And what happened?
A. It clicked.

Q. What did you do then?
A. At first, my mind just went blank and I wouldn't, I couldn't think of nothing. I was going to beg him not to shoot me, but I didn't have time. He pulled it again and he shot me.
Q. All right. Where did he shoot you that time?
A. In the mouth.
Q. Show the jury where he shot you in the mouth.
A. Right here.
Q. Did that bullet come out?
A. Not then it didn't; the took it out in the hospital.
Q. Did they take anything else out at that time?
A. They took a piece of bone and teeth out.
Q. All right. Then what happened?
A. Well, after he shot me in the mouth the first time, I started to start running and he shot me in the neck.
Q. Did you get all the way up before he shot you in the neck?
A. No, sir.
Q. Show approximately how far you think you got up?
A. Well, I can't be sure exactly. I was approximately something like this, partially standing up.
Q. And he shot you in the neck.
A. Yes, sir.
Q. What happened to that bullet?
A. It is still in there.
Q. All right. Show the jury where the second bullet went?
A. It's right there. You can see the scar.
Q. Turn around and show the jury where all of the jury can see.
All right, what happened?
A. Then as I started to run across the yard I was running at an angle from the door, and he shot me in the side, and it come out at my shoulder.
Q. Do you know whether or not this man was chasing you at this time or whether he shot you from the door?
A. No, sir, I don't know.

Q. Did you ever look back?
A. No, sir.

* * * *

Q. Phillip, when you were there at the back door looking at this man with a gun in your face, can you describe the lighting conditions? You have already described them outside, inside now.

A. Well, inside the door, just inside the door they have a light bulb and it was on. Then over the desk that stays right near the front part, there is a fluorescent light which stays on, and then there is one half way down the hall way which also stays lit.

Q. Did you have any problem seeing the man?
A. No, sir.
Q. All right. Can you describe him for the jury at that time?
A. Well, he was a heavy set man, black, he was, his hair was neat and short, had a long face.
Q. Did you notice his clothing?
A. Yes, he had a dark colored pants and he had on a short sleeve knit sport shirt, it was a dull light color and had a ring around the collar on the neck of it.
Q. Can you describe the gun that was in your face?
A. The only thing I noticed about it was, it was just a small revolver.
Q. Could you tell what color it was?
A. No, sir.
Q. Could you tell whether it was dark, silver or dark?
A. No, sir.
Q. Are you sure it was a revolver?
A. Yes, sir.
Q. All right. Phillip, can you at this time point to the man who shot you?

THE COURT: Wait just a minute if you would. At this point in order to properly hear objection and perhaps take some testimony, I will excuse the jury for a few minutes.

Will everyone stand while the jury leaves the courtroom.

(The jury left the courtroom.)

(JURY OUT)

THE COURT: Will every one be seated.

Mr. Goodwill, do you have objection you wish to make, if not specific questions at least. I assume, sir, you are going into an identification procedure.

MR. McDANIEL: You may assume, yes, sir.

THE COURT: Yes, sir.

MR. GOODWILL: Yes, sir, some of the argument will be handled by Mr. Maloney, my co-counsel.

The Court file reflects that on September the 10th, 1973, at First Appearance Hearing held in Polk County, that the defendant was determined to be indigent and the Public Defender was appointed to represent him at that time.

Subsequent to that time—

THE COURT: Not the Preliminary Hearing this was a First Appearance?

MR. GOODWILL: A First Appearance Hearing, the man was already in custody, had been arrested and charged and was at First Appearance Hearing.

THE COURT: Mr. Williams, is there a First Appearance Hearing Order in the file, sir?

CLERK: Yes, sir.

THE COURT: What was the date of it?

CLERK: 9-10-73, sir.

THE COURT: All right, sir.

MR. GOODWILL: All right, sir, on the 11th—

CLERK: It was the order of 9-9-, but it was held on 9-10, sir.

THE COURT: The Public Defender was appointed to represent him?

CLERK: Yes.

THE COURT: Carry on.

MR. GOODWILL: On the 11th of September, according to Mr. Arnold's deposition and information which

we have gathered from other sources, a series of six pictures was shown to this young man.

THE COURT: All right, sir, in order that I can have the proper situation I wish either you or counsel for the State, one or the other, would interrogate.

MR. GOODWILL: All right. Would you prefer it in that manner?

THE COURT: Yes, sir.

EXAMINATION

BY MR. GOODWILL:

Q. Phillip, while you were in the Lakeland hospital did any officers of the Polk County Sheriff's Department come to see you?

A. Yes, sir.

Q. Do you remember when that was?

A. It was about the second day I was in there.

Q. Do you remember the date?

A. No, sir, I don't.

Q. At that time did they show you a series of pictures?

A. Yes, sir.

Q. Do you remember the names of the officers that were present?

A. No, sir.

Q. At that time were you able to speak?

A. A little.

Q. In response to—Did they ask you any questions?

A. Yes, sir.

Q. All right. Did they ask you to answer their questions verbally or write the answers out?

A. I answered most of them verbally.

Q. Did you write your answers out?

A. Yes, sir.

Q. So you were able to speak?

A. Yes, sir.

Q. At that time?

A. (Nods head.)

Q. Of the photographs which you were shown, first of all, were they all colored, were they all black?

A. Yes, sir.

Q. All right. In all other respects—

THE COURT: The pictures themselves.

MR. GOODWILL: The pictures.

THE COURT: Were they black and white or were they colored pictures, sir?

A. They were black and white.

Q. All right. What were these pictures of, just in general?

A. Men.

Q. Just men?

A. (Nods head.)

Q. Did they all look similar?

A. Not all of them.

Q. Were you able to disregard any of the pictures immediately?

A. Yes, sir.

Q. Did you identify a pictures, of the six, what did the officers tell you the purpose of looking at the pictures was?

A. To identify the person that shot me and Mr. Turman.

Q. Did they say if you could or to identify from these pictures the one that did it?

A. They asked me if any of the people in the photographs looked like him.

Q. OK. Of the six did any appear to look like him?

A. Yes.

Q. Did more than one appear to look like him?

A. Not exactly.

Q. Was there a similarity?

A. It was a slight similarity, just slight.

Q. All right.

MR. GOODWILL: Your Honor, I am not sure on this particular procedure, I am in a cross-examination situation or not; I feel that I am.

THE COURT: Yes, sir.

MR. GOODWILL: I would want to lead.

THE COURT: What I want to do is do this as expeditiously as possible and get to the facts.

MR. GOODWILL: All right, sir, that's why I would like to go ahead and lead this witness.

Q. Isn't it true that you pictures and said that both of these men looked sort of like him?

A. Yes, sir.

Q. And isn't it true that you just automatically excluded four of them right away?

A. Yes, sir.

Q. And isn't it true that the reason you excluded him you—

THE COURT: Let him give his own answers.

Why did you discount the other four?

MR. GOODWILL: That's what I was about to ask him.

THE COURT: You were about to tell him and let him agree to it. I would rather have him tell.

Q. Why did you discount the other four?

A. Well, they were either too young or just real small, they just didn't fit the appearance at all.

Q. They just didn't look like him at all?

A. No, sir.

Q. So out of the total of six there were only two of them that really were even a close portrayal of the man you identified. Is that correct?

A. Yes, sir.

Q. Did you notice on the pictures whether or not there were any names?

A. No, sir, there were no names.

Q. There were no names on the photographs?

A. No, sir.

Q. You ultimately identified a photograph of Mr. Darden. Is that correct?

A. Yes, sir.

Q. And do you recall whether or not his name was on that photograph?

A. No, sir, it wasn't on the photograph.

Q. You are absolutely positive of this?

A. Yes, sir.

Q. Was there a date on the photographs?

I am talking about, I assume this was a picture of the man standing face forward and from the side; is this correct?

A. Just face forward.

Q. Just face forward?

A. Yes, sir.

Q. There was no picture of him standing from the side?

A. No, sir.

Q. All right. In the face forward was there anything other than his clothes in front of him in the picture?

A. There was a plate that identified as the Polk County Sheriff's Department and then it had numbers under it.

Q. All right. Do you remember the number 9973?

A. No, sir.

Q. Do you remember being a small white tag on the left side of the photograph of Mr. Darden that said Darden?

A. No, sir.

Q. I am going to hand you six photographs—

THE COURT: Would you mark them for identification, please, Todd?

MR. GOODWILL: Yes, sir.

[Photographs were marked for identification]

Q. While they are marking the pictures, do you remember what day of the week the officers came to see you?

A. No, sir, I couldn't say for sure.

Q. Do you recall telling me on deposition that it was about the third day after I was in there, second or third day after I was in there?

A. Yes, sir.

Q. Do you remember whether it was Monday or Tuesday?

A. No, sir.

Q. Got shot on Saturday. Is that correct?

A. Yes, sir.

Q. All right. And what were you counting as the first day?

A. Well, I was counting Sunday as the first day.

Q. OK. So it was either Monday or Tuesday that they came to see you?

A. Yes, sir.

Q. I show you six photographs marked Defendant's Exhibits number one for identification, and ask you if those were the six photographs that were shown to you by the officers that visited you in the hospital that day?

A. They appear to be, yes, sir.

Q. Well, can you give me a more definite answer.

MR. McDANIEL: Objection. He said they appear to be. That's the best he can do.

THE COURT: Yes, sir. I think he is entitled to say that's the best he can do. Objection will be overruled. Go ahead.

Q. Is that the best you can do is say they appear to be?

A. Yes, sir, I couldn't say for sure.

Q. You can't say for sure?

A. (Shakes head.)

Q. I show you a photograph marked Defendant's Exhibit Number six for identification and ask you if that photograph was shown to you?

A. Yes, sir.

Q. What does that photograph depict?

A. That's the man that shot me.

Q. OK. Is there a white tag on the front of his shirt?

A. Yes, sir.

Q. What does that white tag say?

A. Darden.

Q. Was that on there at the time the picture was shown to you in the hospital?

A. I don't really know. I didn't see it or pay any attention to it if it was.

Q. Did you exclude any of those photographs as not being the person that shot you on the basis of them not having a moustache?

A. No, sir, I don't believe so.

Q. Do you recall my taking your deposition in my office in Bartow, sir?

A. Yes, sir.

Q. Do you recall the following question and answer?

MR. WHITE: Mr. Goodwill, will you tell us what page you are on?

MR. GOODWILL: Yes, sir, page 18.

THE COURT: Are you going to attempt to impeach him at this state of the proceedings?

MR. GOODWILL: On the basis of these pictures.

MR. McDANIEL: It's not the time for impeachment purposes, Your Honor.

THE COURT: No, sir.

MR. GOODWILL: As identification of the pictures, to show that he did exclude certain pictures on certain basis because they did not fit the description he had given the police earlier.

MR. McDANIEL: Your Honor, I don't think the purpose of this examination is to impress the Court. The Court needs the facts surrounding the—

MR. GOODWILL: Mr. McDaniel, I am not trying to impress the Court.

THE COURT: All right, sir, if he has at some previous time given you a statement more detailed or different from this, for the purpose of refreshing his memory, I will allow you to ask him. Not to impeach, but for memory refreshment.

All right.

Q. Do you remember me asking you the following question: "Were there any other pictures that you saw of those six that looked similar to the man that was there that day?

"Answer: There was one that looked a little bit like him, not much, but he had a moustache, had a small moustache and he wasn't as heavy."

Do you recall that?

A. Yes, sir.

Q. So did you exclude any of these photographs, these six that I have just showed you, on the basis that the individual depicted in the photograph had a moustache?

A. Not strictly for that reason, no, sir.

Q. Can you show which of these photographs you excluded?
A. I believe it was this one.
Q. You excluded or included?
A. I believe that's the one I excluded.
Q. You excluded this one? As not being?
A. Yes, sir.
Q. Did you exclude any more?
A. All of them except this one.
MR. McDANIEL: Which one are you talking about this one?
MR. GOODWILL: He is speaking about Defendant's Exhibit Number 6 for identification.
MR. McDANIEL: Let me see the front of that one. Thank you.
Originally, didn't you narrow it down to two photographs and then narrow it down to two?
A. I had it down to two.
Q. All right. At that point can you show me which four you excluded?
A. Yes, sir, it was this four here.
Q. These four were excluded originally?
A. Yes, sir.
Q. OK.
MR. GOODWILL: For the record the witness identified Defendant's Exhibits for identification numbers 1, 2, 3, and 4.
Q. Why did you exclude them?
A. The first four I excluded for the fact they didn't look anything at all like him. They just didn't fit the description.
Q. At all?
A. No, sir.
THE COURT: I think he has been over all of this now, how he worked on the pictures.
Q. After you got shot and before the police officers arrived, did you read any of the newspaper accounts of what had happened?
A. No, sir.
Q. Again on deposition do you recall my asking you the question, pages 21, Mr. White, "after that Saturday

did you read any of the newspapers on Sunday or Monday following the crime?"
"Answer: Yes, sir."
"Did you read about the crime?"
"Answer: Yes, sir."
"Question: Did you read that they had arrested somebody named Willie Darden?"
"Answer: I read that they had a suspect in custody, I am not sure if that gave his name or not."
Do you recall that series of questions and answers?
A. I don't recall the question about, I recall reading about the shooting itself, but nothing about any identification or such as that.
Q. You don't recall this series of questions and answers?
A. Yes, sir.
THE COURT: He remembers part of them, but not all of them.
A. Yes, sir.
THE COURT: Which is it, son, do you remember whether or not you did read the newspapers between Saturday night and the time they came and showed you the photographs or not?
A. I believe I did read about the shooting, but I didn't read anything about a suspect or somebody was picked up for that.
THE COURT: Did you see any pictures in the newspaper?
A. No, sir.
THE COURT: Go ahead, sir.
Q. Then why did you give me the answer that I read that they had a suspect in custody?
MR. McDANIEL: That's argumentative.
MR. GOODWILL: I am only trying to clarify.
THE COURT: Go ahead. I will allow it. Go ahead.
Q. Why did you give the answer: "I read that they had a suspect in custody, I am not sure if that gave his name or not."?
A. Well, they said they had a suspect, but it didn't show any pictures to say who it was, nothing to identify him by.

Q. That you recall at the time you gave this deposition.
A. Yes, sir.
Q. Is it possible that the articles did give his name or give a name?
A. No, sir.
Q. What was your physical condition at the time these officers—First of all, what time did the officers come?
A. It was in the morning.
Q. You are absolutely positive of this?
A. Yes, sir.
Q. Could it have been in the afternoon?
A. No, sir.
Q. What was your physical condition at the time that they came?
A. I don't know what you mean by that.
Q. Well, number one, you were in bed?
A. Yes, sir.
Q. All right. Was your mouth wired up?
A. No, sir.
Q. Or your face, did you have any wiring?
A. They didn't wire my mouth up until toward the end of the week.
Q. Towards the end of the week?
A. Yes, sir.
Q. Were you in any pain?
A. Not unless I tried to move.
Q. Were you in any pain if you tried to move your mouth?
A. No, sir, just stiff.
Q. It was just stiff?
A. Yes, sir.
Q. Do you know if you were on any type of medication?
A. No, sir.
Q. You don't know of your weren't?
A. I don't know for sure.
MR. GOODWILL: One moment, Your Honor.
THE COURT: All right, sir.

Phillip, did you positively identify the man in that picture at that time as being the man who shot you?
A. In the hospital, yes, sir.
THE COURT: Did you positively say, "That's the one who did it"?
A. Yes, sir.
THE COURT: The picture of him.
A. Yes, sir.
THE COURT: Did any of the deputy sheriffs—how many was there in there with you?
A. When I was in the hospital there was two.
THE COURT: All right, sir.
Q. Phillip, didn't they come to see you at five o'clock in the afternoon, on the afternoon of the 11th of September?
A. I don't believe so, no, sir.
Q. They came in the morning?
A. I believe so.
THE COURT: Do you remember what conversations you had with the deputies at the time they showed you the pictures?
A. They just asked me if I could identify him.
THE COURT: Did they tell you anything about any of the pictures?
A. No, sir, didn't tell me nothing about the pictures at all. They just showed them to me and asked me if any of them looked like the man.
THE COURT: Did they tell you where the pictures came from?
A. No, sir.
THE COURT: Did they tell you they had anybody under arrest for it?
A. No, sir.
THE COURT: Did you know they had a man under arrest at that time?
A. I may have, but I couldn't say for sure.
THE COURT: Had you talked to your parents before they came in there about the shooting?
A. Yes, sir.

THE COURT: Had they told you anything about what was going on?

A. No, sir, they didn't know nothing either.

THE COURT: And you didn't know, you strictly didn't know if they had arrested any one for this crime or not at this time?

A. No, sir.

Q. Didn't you say several things on that deposition, such as you didn't pay much attention to most of them because they didn't look anything like him.

A. Yes, sir.

Q. Did you say that?

A. Yes, sir.

MR. McDANIEL: Objection.

Q. Most were small or young.

MR. McDANIEL: We have been through this five times, Your Honor.

Q. In their twenties or slim.

MR. McDANIEL: Wait a minute. I object to all of this line of questioning.

THE COURT: Yes, sir, I think it is repetitious. He has already testified to that, Todd.

MR. GOODWILL: There were only two heavy set.

A. Well, there was one other that was heavy set, but he was way too old.

MR. GOODWILL: Your Honor, I am not trying to be repetitious on this point, except—

THE COURT: If there was some other purpose in the question, I would be glad to hear it.

MR. GOODWILL: In his deposition by repeatedly making the remark that four of these were not in any way like the individual that—

THE COURT: He has said that already today, I understand it.

Four of them were either too old or too young, too big or too small, and just nothing like it and it came down to two that were something like him.

A. Yes, sir.

THE COURT: And from those two you selected pictures of the defendant, one partially because the other man had a moustache.

A. And the other man was also younger, and wasn't as big.

Q. At the time that you were shot back near your home isn't it true that you gave the officers a fairly detailed description of the man that had shot you?

A. Well, fairly, you might call it that, yes.

Q. Didn't you describe him—page 25 of the deposition, Mr. White—as middle-aged, heavyset, black man.

MR. McDANIEL: When are you talking about, I am sorry.

MR. GOOOWILL: At the scene.

MR. McDANIEL: At the time he was shot.

Q. Isn't this the description that you gave them?

A. Yes, sir.

EXAMINATION

BY MR. McDANIEL:

* * * *

Q. All right, Mr. Arnold, I want you to look at this man and tell me whether or not you can identify him from the time you saw him when he blasted you in the face? Can you, think back to September 8th, 1973, forget anything else, forget the hospital, forget everything, September 8th and right now.

A. Yes, sir, that's him.

Q. Do you have any doubt whatsoever in your mind?

A. No, sir, none.

Q. Did the photographs—Are you remembering the photographs?

A. No, sir.

Q. What are you remembering?

A. The day I was shot.

Q. Are the photographs helping you in any way?

A. No, sir.

Q. Whatsoever to identify him?

A. No, sir.

Q. None whatsoever in your mind?

A. None.

Q. Has any newspaper articles—

A. No, sir.

Q. —helping you identify this defendant?
A. No, sir.
Q. Why are you identifying him?
A. Because that's the man that shot me.
Q. Because of the long cross-examination of the hospital Your Honor, I'd like to ask a couple of questions, about the hospital.
THE COURT: All right.
Q. You were shot three times in the face, in the side on September 8th. Is that correct?
A. Yes, sir.
Q. Around six p.m.?
A. Yes, sir.
Q. And you said that you didn't have your face wired up until the end of that week. Is that correct?
A. Yes, sir.
Q. Were you ever in the intensive care unit?
A. Yes, sir.
Q. Do you know when you were put in there?
A. No, sir, I don't remember.
Q. Were you in the hospital for a period of time and then the put you in there or do you know?
A. I believe they put me in the next morning.
Q. Sunday morning?
A. Yes, sir.
Q. Do you know how long you were in there?
A. Just a day or so.
Q. All right. When the two deputies came to you with these six photographs, were they black men—
A. Yes, sir.
Q. The six photographs, were they black men?
A. Yes, sir.
MR. GOODWILL: Your Honor, that's been answered, he has identified the photographs as being the photographs.
THE COURT: All right, sir.
Q. When those deputies came to you how long had you been out of the intensive care unit, do you know?
A. No, sir, I don't know.
Q. All right. You told the Court that you read some newspaper articles but you did not see a photograph.
A. No, sir.

Q. And Mr. Goodwill ask you didn't you read Sunday's paper and Monday's paper and Tuesday's paper. Do you know when you read those papers?
MR. GOODWILL: Your Honor, is he attempting to impeach his own witness.
THE COURT: It's proper examination. Objection will be overruled. Go ahead.
MR. GOODWILL: I think he is attempting to impeach his own witness.
Q. Mr. Arnold, could you have read September 9th's paper, September 9th, 1973, the following Friday?
A. It's possible.
Q. Do you know?
A. No, sir.
Q. All right. You told the Court that you did not to your knowledge see or hear this man's name before you picked this photograph out of that stack of six photographs. Is that right?
A. Yes, sir.
MR. McDANIEL: I have no further questions.

EXAMINATION

BY MR. GOODWILL:

Q. Mr. Arnold, do you know whether or not you were on any type of medication or any type of sedation?
A. No, sir.
Q. You don't know?
A. No, sir.
Q. Were you sleepy, were you tired?
A. When they first brought me in I was tired, but after I got a night's sleep I wasn't, no, sir.
Q. After that you weren't?
A. No, sir.
Q. You knew everything that was going on?
A. Yes, sir.
Q. Why couldn't you answer Mr. McDaniel's questions as to when certain events happened and when certain events did not happen?

A. I just didn't pay any attention to the dates. You know, like reading a newspaper.

THE COURT: Phillip, when was the first time that you saw the defendant here in person after this?

A. Two days ago.

THE COURT: You did not see him any time during the fall, the time of your deposition until up to this week.

A. No, sir.

THE COURT: Have you seen pictures of him in the meantime?

A. No, sir.

THE COURT: You haven't seen pictures in the newspaper or anywhere else?

A. No, sir.

THE COURT: No one has shown you any additional photographs other than the ones they showed you in the hospital?

A. No, sir.

THE COURT: All right. Anything further?

MR. McDANIEL: None from the State.

THE COURT: All right. Mr. Goodwill, we have further testimony I am going to need. Do you know which deputy, does any deputy have a specific time or date on which this photographic lineup was held?

MR. McDANIEL: Mr. Neil does, Your Honor.

MR. GOODWILL: September the 11th, 1973, at five o'clock in the afternoon.

THE COURT: Let's get him in here and put it in the record.

Phillip, you can just step out in the hall just a minute. We will call you back.

(Witness excused.)

DON NEIL, having been recalled as a witness, and having been previously sworn, testified as follows:

EXAMINATION BY THE COURT

THE COURT: Were you present at a photographic lineup on the—when it was shown to Phillip Arnold;

that is, a series of pictures including one of the Defendant?

A. Yes, sir.

THE COURT: While he was in the hospital?

A. Yes, sir.

THE COURT: Do you remember the date of it?

A. The 11th of September.

THE COURT: Of September?

A. Yes, sir.

THE COURT: What time of day?

A. Approximately 5:00 P.M.

THE COURT: All right.

A. Mr. Arnold had just come out of intensive care.

THE COURT: All right, sir. Any other questions of this witness?

MR. GOODWILL: Yes, sir, I have some questions.

THE COURT: All right, sir.

EXAMINATION

BY MR. GOODWILL:

Q. Mr. Neil, did you file a report, a supplemental report, normal supplemental report of your going to the hospital?

A. Yes, sir.

Q. Of this identification?

A. Yes, sir.

Q. Have you examined that report? Are you acquainted with the contents?

A. Yes, sir.

Q. I'm not talking about the long one; just to refresh your recollection, I am talking about this particular report.

A. Yes, I believe so.

Q. Okay. Do you feel that you can testify about its contents, based on your recollection?

A. Yes, sir.

Q. Word for word for each question generally?

A. Yes, sir.

Q. Was it in your report that Arnold was unable to speak as his mouth was wired together as a result of being shot, although he did write the answers to questions, "questions asked him by myself and Keeny. See attached paper"?

A. Yes, sir.

Q. All right. Do you have the attached paper?

A. I can produce it. It's in my file outside.

MR. McDANIEL: If you have a copy of it, I have no objection to your showing it to him.

MR. GOODWILL: Well, I may want to introduce it.

Q. Is this a true and correct copy of the written statement?

A. It appears to be, yes, sir.

Q. Is it complete, and this is his entire written statement?

A. This is the answers to the questions, yes, sir, that we asked him at the hospital.

Q. All right. This report starts on 9/11/73, 5:00 P.M. The first thing, I assume, is an answer from Mr. Arnold, "Both of these two look a little like him." What was the question, or where is the question to that answer?

A. I'm sure it needs an explanation. Officer Keeny and myself were there in the hospital room with him. We handed him the photographs and told him to study these over and be certain of his identification before he decided. And this was basically the first question there.

Q. But that does not appear on this report? Just his response to that question?

A. The response to it, right.

Q. Then I assume the question was asked, did he have a moustache, "I don't think so."

A. Yes, sir.

Q. At the bottom it says, "Right. What is displayed of the photo that you choose at this point?"

A. Yes, sir.

Q. Would you tell me what appears below that?

A. Well, on each photograph there was a, I guess you would call it a name plate with date, the agency, and in most cases, usually a number, file number. Being as he could not speak too clearly with his mouth wired shut, we asked him to write what was on the face plate, whichever photograph he chose.

Q. All right, is this what he wrote?

A. Yes, sir.

Q. And what does that say?

A. Sheriff's Department, Bartow, Florida. The number is 4644, dated 9/9/73

Q. Was that a date that appeared on the photograph?

A. Yes.

Q. All right. I show you Defendant's Exhibit No. 6 for identification, and ask you if this is the photograph of Willie Jasper Darden that you showed Mr. Arnold on that date?

A. This is not the one that I showed him. I showed him one like this.

Q. Is this an exact copy that was provided to the Public Defender's Office at the request for discovery?

A. It appears to be, yes.

Q. All right. Now, is this the face plate that you are talking about?

A. Yes.

Q. Is there any difference between what Phillip Arnold wrote here and what appears on the face plate here?

A. Only that the name Darden.

Q. All right, sir.

THE COURT: Did the photograph have Darden's name on it?

A. Yes, sir.

Q. How many of the other photographs, if you remember, had names on them?

A. One, possibly two others.

Q. Can you be sure?

A. I can be sure of one other.

Q. Do you remember who that was?

A. Myles.

Q. Do you remember any other? Well, for the purpose of clarification, are these the six pictures which were shown or copies of the six pictures that were shown?

A. Yes, sir.

Q. Except for Mr. Myles and Mr. Darden, does the name of any one of the other persons appear on the pictures?

A. Only on two of them, Myles and Darden.

MR. GOODWILL: For the purpose of the record, I showed him Defendant's Exhibit 4, No. 1 through 6 for identification.

THE COURT: Were all of these people you had some reason to believe the man who might have done the shooting, or just pictures you picked out?

A. No, sir, these were just photographs that I put with the other to eliminate any direct attention to the suspect.

THE COURT: Yes, sir.

Q. All right. Officer Neil, isn't it true at this time that Mr. Darden was under arrest and in the Polk County Jail?

A. He was.

Q. At the time these pictures were shown to Phillip Arnold?

A. Yes, sir.

Q. All right. And these pictures were shown to him on the 11th of September, is that correct?

A. Yes, sir.

Q. Have you at any time since that date contacted Phillip Arnold relative to having a lineup?

A. Physical lineup? No, sir.

Q. Of what are commonly referred to as just a lineup.

A. No, sir.

Q. To your knowledge, has been out of the hospital and has been able to attend a physical lineup if one were arranged?

A. He could have. I wasn't aware of the date of his release.

Q. But sometime in the last four months, a physical lineup could have been arranged?

A. Yes, sir.

Q. And which Mr. Arnold could have appeared and—

A. Yes, sir.

Q. —done whatever he was supposed to do?

A. Yes, sir.

THE COURT: I have enough of the facts. Do you want to argue the law?

* * * *

[VI; 482-488]

[MOTION TO SUPPRESS]

(The attorneys, the Court, the clerk, and the Defendant and the court reporter retired to the Judge's Chambers, at which time the following took place:)

(JURY OUT)

MR. MALONEY: Your Honor, I move the Court to suppress the in-court identification—

THE COURT: All right, sir.

MR. MALONEY: —which Mr. Arnold probably is going to make.

THE COURT: Which outside the presence of the jury he did make.

MR. MALONEY: He did make it.

THE COURT: All right, sir.

MR. MALONEY: I move to suppress that on due process grounds. I think that the lineup, the photo lineup which was shown to Mr. Arnold on the 11th was in violation of the 5th Amendment right "to be confronted with the witnesses against him." Clearly Mr. Darden couldn't have been in the hospital to confront the witness against him, but the record will reflect that he was represented by counsel at that time, and I believe he had a right at that time to at least have his counsel present to see the photographs to find out if they were substantially fair.

In line with the decisions of the Supreme Court in Stovall, Gilbert and Wade concerning photographic lineup and also in line with the later Supreme Court decisions being Simmons vs. United States which stated that all due process consideration which one must give one in a lineup must also be given in a photo lineup.

Regarding the point of having an attorney present, I think that although the United States Supreme Court has not ruled on the decision the Federal Appellate Courts have. I cite to the Court the United States vs. Seiler, 437 Federal Second 1305, Third District 1970, which stated that counsel is necessary at a photo lineup which subject or defendant is in custody.

I think it is clear that Mr. Darden not only was in custody, but he was accused of the crime of murder.

In 219 Southern Second 762, that is the decision of the Third District Court of Appeals 1969, wherein the facts being that the police took a video tape of a suspect and then after he had been appointed counsel showed his viedo tape to the victim of a robbery. The subsequent conviction of the defendant was reversed, the Court holding, in essence, that we believe that under the state of his record the defendant had a right to counsel at the time of confrontation, that what the police could not do directly, I think referring to a lineup, should not be allowed to do indirectly through the miracle of photographs.

I think Florida is in the minor camp on the issue where an attorney has to be present at the photo lineup if in fact the defendant had been appointed counsel. The rational I think of the case is stating that the attorney should be there if he has been appointed, that the accused is entitled to counsel at any critical stage of the prosecution. I think the critical concept was incorporated by the Supreme Court in the Escobida case and Miranda decisions. And I don't think there can be any doubt that in this particular case that the photo lineup shown to Mr. Arnold was a critical stage of the of the prosecution of Mr. Darden.

Quoting from another case that concerned a photo lineup without an attorney in which I believe was reversed on a robbery, this being United States vs. Zelker, I didn't get the cite on it.

THE COURT: All right. Suppose we, for the sake of argument, go along with the photographic lineup being improper because of failure to notify counsel and have him present. There has been no proffer in testimony here from the State of evidence concerning the photographic lineup; we are here on motion to suppress an in-court identification. The testimony of the witness was made not upon the photograph but upon his independent recollection of the appearance of the defendant. Have you got any cases on that?

MR. MALONEY: In United States vs. Zelken the photo identification was suppressed. The Court went on to say that since the requirements were not met in that, it went on to say the burden was on the prosecution by clear and convincing evidence the identification be based upon observations of the defendant other than at the improper confrontation.

MR. GOODWILL: Also running through the case lies the idea when there is an opportunity and time is not of the essence, which it was demonstrated by the testimony in here, that in order to correct any possible taint of photographic identification that the better procedure is to hold a lineup and thereby correct any possible problem that may have been incident to the photographic lineup.

There has been ample opportunity for a lineup. Mr. Darden, I believe at the time that he was representing himself, filed a motion for a lineup. There is no reason why this boy could not have been brought in and in the presence of counsel had a lineup. I believe, sir, if that had been done and the identification had been made at that time that whatever taint may have been created by the photographs would have been removed by what the Courts seem to refer to as a much better manner of identification.

MR. WHITE: Your Honor, if the State may respond briefly. We have not offered into evidence anything, any evidence resulting from that lineup. Mr. Arnold was there on the stand, he has already proffered to the Court "when I point to that man today I am pointing to him for one reason, my observations the night of the crime, nothing in between."

There is a case Avis vs. State 221 So. 2nd 235 that says—it is almost right on point—that says a victim can make in-court identification even if he viewed a lineup in which defense counsel was not present if he can get on that stand and through his own testimony say I am making this identification independent of any lineup or anything that has gone on between the night of the event and right now.

Arnold has already said that.

THE COURT: I am going to allow the in-court identification, but would not allow testimony from the State as to the photographic lineup. If the defense wishes to bring in evidence concerning the photographic lineup to destroy the weight or effect of the in-court identification, I think that would be proper, but I will cross that when I come to it.

You see what I am talking about?

MR. MALONEY: Renew the motion we made the other day on the additional grounds without elaboration. I think there was argument at the time. The photographs of Mr. Darden shown to Mr. Phillip Arnold in our opinion was the fruits of an illegal arrest and we would object to it even having been shown to him in the first place, and this further taint adds error on error, and we would object to it. And on the basis the photographs should never have been taken, the fruit of an illegal arrest.

THE COURT: Yes, sir. I personally took testimony on the motion to suppress, and I am taking judicial notice of the testimony at that time without retaking the same testimony this morning.

I will deny your motion, would allow the in-court identification, not any evidence from the State to the photographic lineup. The defense, if you wish to, in order to attack the credibility of the identification of the weight of it, may put in photographic evidence, if you want.

[VI; 489-500]

[TESTIMONY OF PHILLIP ARNOLD]

PHILLIP ARNOLD, having been recalled as a witness on behalf of the State, and having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. McDANIEL:

Q. The problem that I have discussed with the Court before, I think—that I am not sure if I've asked this question. If I have, please tell me. Phillip, did I ask you to describe the lighting conditions in the building when you were facing the gun?

A. Yes, sir.

THE COURT: All right, you have described that, right?

A. Right.

Q. What is your age, Phillip?

A. 17.

Q. How old were you on September the 8th, 1973?

A. 16.

Q. Phillip, since that date, have you, on any opportunity, ever discussed this case with Mrs. Turman?

A. No, sir.

* * * *

Q. Phillip, I want you to think back to the afternoon or the evening of September the 8th, 1973. I want you to remember the person that had the gun in your face. I want you to remember the person who pulled the trigger, and remember the person that shot you in the face.

A. (Nods head.)

Q. And in the back or side.

A. (Nods head.)

Q. I want you to look in the courtroom and see if you see that man today.

A. Yes, sir, the Defendant.

Q. What color shirt does he have on today?

A. Blue.

Q. That's the man at the end of the table?

A. Yes, sir.

Q. Phillip, is there any doubt whatsoever in your mind that the man you pointed to is the Defendant?

A. No, sir, none.

Q. Pardon?

A. None at all.

MR. McDANIEL: Let the record show that the witness identified the Defendant.

Your Honor, would you ask the Defendant to rise for a moment?

THE COURT: All right. Stand up, please, Mr. Darden.

(The Defendant stood.)

THE COURT: You may be seated.

(The Defendant was seated.)

Q. Phillip, since September the 8th, 1973, does he appear any different than he did when he pulled the trigger in your face?

A. He has lost some weight.

Q. Anything else?

A. His hair is different, and he has grown a little beard.

Q. What?

A. A bit of a beard.

Q. A beard?

A. Yes, sir.

Q. How is his hair different?

A. It's a bit longer.

MR. McDANIEL: No further questions.

CROSS-EXAMINATION

BY MR. GOODWILL:

Q. Phillip, wasn't it your father that first saw Mr. Turman?

A. Yes, sir.

Q. Did he go over?
A. No, sir, not at that time.
Q. Did he say anything to your mother?
A. Yes, sir.
Q. What did he say?
A. He went and told my mother he thought Mr. Turman had shot himself or something like that, that we should go over and help Mrs. Turman.
Q. And she, of course, did not.
A. No, sir, she had just got back from church and she wasn't dressed to go over. She was changing her clothes at the time.
Q. So it fell upon you?
A. Yes, sir.
Q. You say that you—I can't recall your answer on direct in—that you could not describe the gun?
A. I couldn't describe the color of it.
Q. Do you recall describing it to me in the past as being a snub-nosed?
A. I said it was a small, short.
Q. Do you recall using the term snub-nosed?
A. I don't recall it, no, sir.
Q. Okay. When you first saw Mrs. Turman and the assailant, what was the lighting conditions where they were?
A. They were standing right by a fluorescent light.
Q. Okay. And what was Mrs. Turman saying to you?
A. She was saying, "Phillip, go back."
Q. Did she say anything about get help?
A. Yes, sir.
Q. Did she continue to say this the entire time you were there and up until the time you ran?
A. I don't remember.
Q. How much time elapsed from the first time you saw the man that you have described as the Defendant, and the time you turned and started to run? Can you estimate?
A. Oh, I'd say about 20, 25 seconds, something like that.
Q. Do you remember which hand the gun was in?
A. It was in his right hand.

Q. You don't actually know who shot the third shot, do you?
A. No, sir, I didn't see that one.
Q. Do you remember describing the man that shot you to me as being a big man, you could tell he was a big man, heavyset?
A. Yes, sir.
Q. Do you recall telling me that he was on the tall side?
A. Yes, sir, I said a little toward tall.
Q. Do you recall telling me he was just a little shorter than you were?
A. Yes, sir, I said he was shorter than me.
Q. That wasn't my question.
MR. McDANIEL: What page are you on?
MR. GOODWILL: I'm not on any page.
MR. McDANIEL: All right, okay.
MR. GOODWILL: Now on Page 6, though.
MR. McDANIEL: Okay.
Q. How tall are you?
A. Six foot two.
Q. Page 8 of the deposition you recall that we took in the office?
A. (Nods head.)
Q. Do you remember me asking you the question: "How big was he in relation to you? Answer: I'd say he was a little bit shorter. I never really did, you know, stood up him, next to him; but looking at him, I would say he was a little shorter, but not much."
A. Yes, sir.
Q. Do you recall that?
A. Yes, sir.
Q. Is that still correct?
A. Yes, sir.
Q. Okay. During the time that you saw the man, you weren't keeping your eyes on him every minute, were you?
A. No, sir.
Q. You were worried about Mr. Turman?
A. Yes, sir.

Q. And that was your prime concern, wasn't it?
A. Yes, sir.
Q. Is that the reason you didn't get out of here, as Mrs.Turman was trying to tell you to do?
A. Yes, sir.
Q. Because of your concern for Mr. Turman?
A. Yes, sir.
MR. GOODWILL: Just one moment, Your Honor.
THE COURT: All right, sir.
Q. Did the man who shot you that day have a moustache?
A. I couldn't say for sure if he did. It was a very thin one.
Q. Were you close enough to him to be able to see whether or not he did?
A. Yes, sir.
Q. Whether or not he did or didn't?
A. Yes, sir.
Q. Do you remember telling me on that deposition that the man didn't have any hair on his face when you described him to the officers?
A. Yes, sir.
Q. Basically, the rest of the description is as you just told me a minute ago?
A. Yes, sir.
Q. Big man, tall man, just a little shorter than you are?
A. Yes, sir.
MR. GOODWILL: I have no further questions.
THE COURT: Redirect?
MR. McDANIEL: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. McDANIEL:

Q. Phillip, in response to Mr. Goodwill's question, you said you could not tell what color the gun was, is that correct?
A. Yes, sir.

Q. Can you estimate how far your face was from the end of the gun?
A. About two feet, two or three feet.
Q. All right. I believe that you said that you were squatting down over Mr. Turman at that time?
A. Yes, sir.
Q. Was Mr. Darden standing on the ground or was he standing inside the building?
A. He was inside the building in the doorway.
Q. In the doorway?
A. Yes, sir.
Q. Higher than you?
A. Yes, sir.
Q. You were looking up at him, is that correct?
A. Yes, sir.
Q. Did the gun in your face make him look any bigger at that time?
A. Yes, sir.
Q. You told Mr. Goodwill you did not know who fired the third shot that hit you in the side, is that correct?
A. Yes, sir.
Q. Did you see anyone else at that time in that vicinity with a gun in their hand besides Mr. Darden?
A. No, sir.
Q. Did Mrs. Turman have a gun in her hand?
A. No, sir.
Q. Did you see a gun in her hand?
A. No, sir.
Q. Phillip, after all of the cross-examination now, would you look again and tell this Jury whether you have any doubt whatsoever this is the man who pulled the trigger in your face.
MR. GOODWILL: I object, Your Honor. Repetitious. He's already made the identification.
MR. McDANIEL: I am sorry, Your Honor. It may have been weakened, I don't know, by cross-examination. If he did, I would like the witness—
THE COURT: Well, the purpose of redirect is to bring out new matters on rebuttal of anything on cross,

and not to rehash the same thing as before. I will sustain the objection.

MR. McDANIEL: All right.

MR. GOODWILL: I just have one question.

RECROSS-EXAMINATION

BY MR. GOODWILL:

Q. Phillip, do you remember telling me that when you looked down and you saw the gun, that your mind just went blank for a minute?

A. Yes, sir.

Q. Is that true?

A. Yes, sir, it did go blank for just a second.

MR. GOODWILL: That's all.

[VIII; 713-715]

[TRIAL COURT'S PREARGUMENT INSTRUCTIONS TO JURY]

PROCEEDINGS

January 19, 1974

THE COURT: Ladies and gentlemen, we have now reached that stage of the trial proceedings where you will hear the closing arguments or the summation of the attorneys. Each of the attorneys, I think, are going to speak to you today. First, let me tell you what their summations are not. They are not evidence, and you are not to consider them as evidence. Any statements of fact or statements of their recollections of what the evidence was is not binding upon you. You are the sole judges of the evidence, and your memory of what the witnesses said is what counts. I am sure that none of the attorneys would intentionally misquote any evidence or mislead you in any way. They are all respected attorneys back in Polk County; they are all personal friends, I think, of mine; and I know each of them well. And they would not misrepresent anything intentionally. Still, memories manage to differ. And your memory is what counts. Their statements of law are not binding upon you. You will take the law as I shall instruct you upon it at the conclusion of the arguments. On the other hand, they are permitted to argue the law to you. They are certainly permitted to argue the facts to you; so that they will both be involved. But they are not binding upon you.

Now, let me tell you what they are. They are a big help to you, or can be. These are men who are trained in the law or trained in trials, and their analysis of the testimony, their analysis of the issues, their comments upon the pertinence and the weight of the particular items of testimony can be extremely helpful to you in reaching your deliberations or any of your deliberations in reaching your verdict.

So, I urge you to pay very close attention to them. You will listen closely to all of the testimony, and I

appreciate it very much, and I would urge you to pay equally close attention to the summations by the attorneys.

Now, under our rules of procedure, if the Defendant puts on no testimony other than his own, then his attorneys are entitled to the closing argument. That was the case here. So the order in which they will speak this morning, Dennis, I guess you will open?

MR. MALONEY: Yes, sir.

THE COURT: For the Defendant, and then both Mr. McDaniel and Mr. White will speak, and then Mr. Goodwill will have the closing argument. All right, are you ready to proceed, now?

MR. MALONEY: We are ready.

MR. McDANIEL: The State is ready, Your Honor.

THE COURT: All right, you may proceed, then.

[VIII; 716-737]

[CLOSING ARGUMENT FOR PETITIONER: MR. MALONEY]

MR. MALONEY: I don't intend to take a lot of time, no more than half an hour. I thank you for the attention that you have given. It's been five days now, and I have never been in a trial that lasted five days, and I am sure none of you, most of you have never been on a Jury that lasted five days. It's the attention that you have given the State's case and the attention you have given Mr. Darden, I thank you for.

And again, I sympathize with you. For you see, whereas Goodwill and I and Mr. McDaniel and Mr. White have been wrestling with this thing for five days, actually more than that, months, five days here before you, we are done. The monkey is off our back. All of the evidence is in. We put in all that we are going to put in. The State put in all that they are going to put in. It's all over. It's all before you now, and quite frankly, we are asking you to play God. We are asking you today to determine whether a man is going to go home to his family or whether a man is going to die, it's just that simple. But it's not very simple, is it?

I intend to just briefly summarize the evidence that has been before you. I'm going to attempt to be as objective as possible. The first witness that you saw was Mrs. Turman, who was a pathetic figure; who worked and struggled all of her life to build what little she had, the little furniture store; and a woman who was robbed, sexually assaulted, and then had her husband slaughtered before her eyes, by what would have to be a vicious animal.

And she came before you, and she told you about it, and it was very difficult for her to do so. And then in the end, Mr. McDaniel said was the person in the room, and she said yes, sir. Who did it, and she said he is here. That is what is called positive evidence, eyewitness identification. Very good evidence.

But I ask you to put yourselves in her position in that was she really in a condition to get a good look at him? You remember I asked you earlier, do you

really think that if you were to see a picture of me four months from now, you would be able to say, I remember that fellow. Perhaps you could. If I killed your wife or your husband, sexually assaulted and robbed you, could you? It would be more difficult if I did it in a dimly lit room, late in the evening. It would be more difficult still.

The police asked her, I think, at eight o'clock, the report came in. The police were right there on the scene at that little furniture store, hauled her husband off; he died some two hours later, And the police asked her who did it, what this man looked like. And I think her description was, I think we've heard it, it's in evidence: She said he was a heavyset man. He weighed 200 pounds or over. He was five foot six. Remember, that was at eight o'clock, two hours after this happened. That was her description of the man. Mr. Darden, would you stand up?

(The Defendant stood, and then was seated.)

MR. MALONEY: Five foot six and over 200 pounds? Four or five days later, she identified Mr. Darden as being the man that had done it. He had been arrested, put in jail. He was at a preliminary hearing. There were no other black men in the room. Just a question of a woman admittedly in shock being brought in for a ridiculous legal formality, with her sister to keep her from breaking down to get her there, bring her in, put her on the stand, and say, is this the man? Is she going to say no? I don't think she would. The only black man she knew and so from that preliminary hearing we get to this trial and on that identification, which I think could easily have been mistaken, because of the circumstances surrounding it. And go so far as to say, in my opinion, the identification was mistaken.

The next witness was Mrs. Hill. I forgot one thing about Mrs. Turman. She was able to say that she thought the crime occurred shortly after six, she didn't know exactly when, shortly after six. Then Mrs. Hill

came along and she heard the shots and she also said that it occurred shortly after six. So we have got the time down—not real well—we would like to get it down to 6:06 o'clock, but we can't. It was shortly after six. So she said she lived 500 yards up the road and that she heard the shots and came out and saw Phillip Arnold, the boy who got his mouth blown up, running up the road. She did not know Phillip very well, but she went out and tried to help him, get him over to the tree for the ambulance.

I think the importance of her testimony—I think the reason that Mr. McDaniel and Mr. White asked her to testify is that she was able to say that this was shortly after six, and two, "I looked down the road and there was" I believe she said a green, late model Chevrolet turning into Route 92, the road that is right in front of the furniture store.

And I think it was a black man in the car, I think that's what she said, a black man, or a white man very heavily tanned, from 500 years, you know, it's neither here nor there. It's not really in question anyway, the man that shot Mr. Turman, shot Mr. Arnold, was black. It is entirely possible that the man driving the car was the man that did that.

The State's next witness was John Stone, and this was a very unusual witness, I would say, because he was almost our witness, a Defense witness. He said, "I was driving home from St. Petersburg, had the family down to the beach and it started raining and we started on home. I didn't have a watch, so I don't know for sure what time it was. But once again, I think it was shortly after six. I saw an accident; indeed, I was almost involved in an accident. The man almost hit my car, and he drove off the road and hit a telephone pole."

Mr. Stone got out of the car and went down in an attempt to render assistance. The man that he identified is the man that ran off the road and hit the telephone pole, is Willie Darden. We are not contesting that.

The State can come across with all sorts of things, but that's not important. We're telling you the man who ran off the road and had the accident was Willie Darden, and that was shortly after six. I think the interesting thing about Mr. Stone's testimony and the thing that differs from virtually all of the—well, not virtually all—both of the State's eyewitnesses, Mrs. Turman and Phillip Arnold. Mr. Stone said that the man he saw was about six feet tall, medium build, middle-aged, and had a moustache. Mrs. Turman said the man did not have a moustache. Phillip Arnold said the man was clean-shaven. The only man, the only man who saw Willie Darden on that day, said Willie Darden had a moustache.

The next witness is Mary Simmons, the girl who came along and saw the accident, saw this man standing around there, stopped and says, "Can I give you a ride to Plant City to get a wrecker?" Darden says, "Yes, please, I'd appreciate it." He gets in the car and drives to Plant City, attempts to get a wrecker in Plant City and can't get a wrecker. Says to the girl, "I'll pay you if you will drive me to Tampa," which she does. There is nothing particularly unusual about the man. The man did exactly what anyone of you would have done, I think, if you had had an accident, your car disabled, you would go for a wrecker, something to get it out of there. You can't lay on the side of the road. This is not a man fleeing from a murder and a robbery and a shooting of a little boy. This is a man driving to Tampa who has an accident, then does the logical thing, get a wrecker. There was a lot of talk, I guess, about his shirt, bloody shirt. Darden says his nose was bleeding. He had taken the shirt and wiped some blood on it. He hurt his stomach and he come out crouched. Mr. Stone said yes, when I saw the man, he was bent over like that. Darden said I hit my head and my chest on the steering wheel after hitting the telephone pole; pulled out his shirt, and there is nothing unusual, nothing incriminating about that. The State would have you believe it is. It is not. Bloody shirt, there's no mention of that. Where did the

blood come from? Darden says it came from me. The implication that it didn't come from Darden, that it came from someone else. There is an easy way to test that. You can run a blood grouping test to find out if the blood on the shirt belonged to the person who owned the shirt. Mr. Turman's blood type was not Mr. Darden's type.

MR. McDANIEL: Your Honor, he is not arguing, he's testifying.

THE COURT: Oh, I think it's within reason, and I'll overrule the objection. Go ahead.

MR. MALONEY: I am a little bit out of turn, you know. I think if I asked Dr. Mezger if you recall, what was Mr. Darden's blood type, I think I asked Dr. Mezger what was Mr. Turman's blood type, and I think Dr. Mezger said Mr. Turman's blood type was Type A and Mr. Darden's blood type was Type O. So, you can safely disregard any implications which might arise from a bloody shirt.

The next witness was Mr. Cunningham, an excellent witness, an excellent witness. He had been at it how many years? 15, 20 years with the FBI experts. He knew what he was talking about. Took a look at that gun and said that gun was a .38 regular; it was rechambered to a .38 special; there are thousands of them in the United States, thousands. .38 used to be a standard police weapon. He said he took some bullets that he had fired from the gun when they sent it to him in Washington, D.C., under a microscopic examination, he said he checked the rifle characteristics, checked the lens and grooves and test fired the weapon and compared the slugs which he had test fired of that weapon to the slugs coming out of the head of Mr. Turman.

He said there is no way I can tell you where that slug came from, no way. It could come from any .38 special. It could no more come from this pistol than any other .38 special. Asked him was it possible to tell when was the last time that gun had been fired before he got it. He couldn't tell that either. That was his testimony and that would be expert from Washington, D.C. That was the man paid how many dollars to

get down here, ask his expert opinion, of whether the bullet that killed Mr. Turman came from that weapon, and he said, well, "I don't know. It could have come from any .38 special or .38 regular, any .38 Smith & Wesson."

I wonder how much credibilty, how much weight you can assign to that weapon.

Then came Mr. Brady. Mr. Brady, who has been with the Polk County Sheriff's Office for 17 years, has been in charge of the ID section of the Polk County Sheriff's Office for 16 years, in charge, the main man, said Mr. Brady, when you got on the scene, did you fingerprint anything? It seemed to me you would fingerprint everything and Mrs. Turman said the man had been in the store for 10 or 15 minutes looking at stoves, looking at beds, looking at $600 worth of furniture, took that money out of my cash register. Was he careful about it? No, he wasn't careful.

Al Brady, the ace investigator, "Al, did you take any fingerprints?" "Yeah, we took fingerprints of the cash register." "And did you get anything?" "Well, why didn't you take any of the fingerprints of that sliding window that the killer had to close, or that sliding door, or the back door that was pulled down, or the doorknob." And you see a picture of that doorknob that he had to close with, taking fingerprints of that? "No, sure didn't. She didn't tell me to." Chief of detectives in Polk County, Florida. This widow, in shock, didn't tell him to and so he didn't do it. Wouldn't it be nice if he did? Wouldn't it be nice if he could give you a fingerprint? And took it from the back door, took this from the sliding front door, all of these fingerprints match Willie Darden, that would be nice. Fingerprint is very good identification, but he didn't do that. He fingerprinted the cash register, he didn't get any fingerprints. Wouldn't it be nice for me—I'd like lots of fingerprints. Wouldn't it be nice for Mr. Darden? But, you don't get the benefit of that because a widow in shock forgot to tell the chief of detectives, the identification of the Polk County Sheriff's Office, to dust for fingerprints. How about tire prints? The State is making an awful lot of the accident down the road. If we could just get tire tracks, a picture—it was raining. A little photograph, a Brownie, an Instamatic, I don't care, a photograph of the tire tracks taken from out there on that muddy driveway or going down to that accident and look at the wheel, an expert can do that. Bang. They could say yeah, this car hit that telephone, was right there. It pulled into the front. It stopped. It was parked here. Don't know who was driving it, but that car was here. Did the chief of ID of Polk County, Florida, bother to do that? No, he didn't bother to do that at all. Apparently the widow didn't tell him to do it. I wish he had, I'll bet the State wishes he had, I bet you wish he had.

The Judge is going to tell you to consider the evidence or the lack of evidence. We have a lack of evidence, almost criminally negligent on the part of the Polk County Sheriff's Office in this case. You could go on and on about it. We all know there has been no expert testimony. You don't have to be an expert to shoot a gun. Isn't it true that you can tell from watching television that there is a way to tell a man fired a gun in the last few hours? Isn't there a ultraviolet test you stick your hand under and you can see the carbon. Isn't there a paraffin test? Did the Polk County Sheriff's Office give this man, who they arrested some four hours later, a paraffin test, an ultraviolet test? Did they bother? No. They didn't bother, they just didn't bother. I just don't know why they didn't bother, but they didn't bother to do it. The facilities are there. It takes five minutes to do it. It goes on. There's no evidence.

Darden asked for a lie detector test. Did he get his lie detector test? No. They didn't bother. Darden asked for a lineup. Does he get a lineup? Didn't bother. Polk County just decided we got our man, we caught him a couple of hours after the incident, and it was a marvelous bit of police investigation and they stopped right there. They just said, we got the man. Wouldn't it—if they did have the man, couldn't lock on this thing right here, and said, we've got the man. Look at that, he fired a gun within the last 48 hours. Nothing. Everybody picked him out in the lineup? Have photograph

of the tire tracks that match the car he crashed in there? Fingerprints found inside the store on the sliding door and the door handle? Didn't have it.

You people would just be putting in time and so would I. But I'm not putting in time. I haven't been putting in time for the last five years, because they don't have it. They didn't bother to do it. They took a coincidence and they magnified that into a capital case. And they are asking you to kill a man on coincidence.

MR. WHITE: Your Honor, the State is going to object to that last statement.

THE COURT: I think it's reasonable comment. The objection will be overruled. Go ahead, sir.

MR. MALONEY: Dr. Mezger then testified about that, Phillip Arnold testified to it. Phillip, poor guy, was in the wrong place at the wrong time. His father saw Mr. Turman get shot, told his wife to do it, and the wife told Phillip to do it; and I think if Phillip had a younger brother, he would have told the younger brother to have done it, until the end of the stick. And Phillip walked over there. And he looks down and see this man with blood pouring out of his head, and leans down to help him. Looks up briefly, sees a black man and Mrs. Turman.

Mrs. Turman screaming, "Go away, Phillip, get out of here." He said, I didn't pay a lot of attention to her, I was just concerned with the man. He was standing there looking at him, and he looks up and the man has got a gun and it goes bang, and hit him in the neck and the bullet is still there. And bang, and by this time he has caught on to what is going on, and he is up and running and he is hit. If he had been an older woman or a man, he would be dead. He wouldn't have got up. But he is a young, strong boy, taking two shots from point-blank range with a .38 caliber pistol and he still gets up and he starts running.

And this murderer ran after him, aimed again, and this poor kid with half his brains blown away. Fires away, again hits him in the back, and he keeps on running. Mrs. Hill said he ran 500 yards before he collapsed in front of her house. It's the work of an animal, there's no doubt about it.

But what about Phillip's identification? Under those circumstances, do you think it is really gotten good identification? No, it was dark. The man—Phillip Arnold, 16 years old. Have you ever leaned over and saw a man with his face blown away and then looked up and had your own blown away and then you can identify the person? The boy is not lying. There wasn't a person that you saw take that stand to swear to God to tell the truth told you a lie today or in the last five days.

He wasn't lying. He is 16 years old, saw the papers, knew they had a suspect, he went along with the majority. He went along with what the police told him. The police could have arrested me, painted black chalk on my face, and Phillip would have said yes, because the Polk County Sheriff's Office had made their case.

Then came Dan Weatherford who discovered the pistol, some 39 feet from where the accident occurred, found—was it four—spent cartridges. I think it was four spent cartridges, one missing in the chamber, and one live round in there. So, they have got themselves just what they need. They are going to hang the man that crashed that car, because he happened to be black, middle-aged, and going in the wrong direction.

We said, Mr. Weatherford, you are a detective, you have been a detective for years and years. Can you tie that pistol to this man? Have you got any evidence that you can tie that pistol to Willie Darden? No, sir, I do not. Is there any evidence you can tie that pistol to the murder of that poor man Turman or the shooting of Phillip Arnold? Answer, no, sir, no evidence. That's the string that runs off of this case—no, no, sir, no evidence. The gun is found 40 feet from the wreck, 39. Mr. Weatherford also indicated it was found exactly 39 feet from the road, heavily traveled road, a few hundred feet or a hundred feet from a railroad. How many feet from the parking lot of a well-used bar? Said at the accident scene there was just lots of people, lots of people standing around, tromping around the old accident scene, lots of

people there. Lots of people looking for guns. He didn't find any until 18 hours later. And how many other people had driven by? And you have even from a train or a car and there is a number of ways that you can get a pistol out there.

But can you get the pistol back to Mr. Turman? Can you get the pistol back to Mr. Darden? No, we can't do that, but we got the pistol, and it's good enough for us. It's not good enough for me. I wouldn't do what you're being asked to do on that, really, I wouldn't. You are going to get an instruction from the Judge on circumstantial evidence, which is what the State would have you believe that an accident is circumstantial evidence.

I would suggest to you that that is not circumstantial evidence. It really isn't. Because, they are asking you to draw some inferences. The first inference they are asking you to draw from from that pistol is one, that pistol belongs to Willie Jasper Darden. There has been no evidence on that. Two, that pistol that, by inference, belongs to Willie Jasper Darden, that pistol killed Mr. Turman, shot him between the eyes and blew his brains out. That pistol shot Phillip Arnold three times.

Two inferences, both of which are totally unsupported by one shred of empirical, hard-core, factual evidence—fingerprints, ballistic reports, no paraffin test on the hands of Darden, no nothing. Inference on inference. It is no longer circumstantial evidence when it is inference on inference because at that point, it is speculation, pure speculation. It's guesswork. Go in there and guess and come back with the verdict. And you know what the verdict is that the State wants. You know what the State would like for you to do. That's the State's case. I am not going to talk about our case. Our case is Mr. Darden, and Mr. Goodwill will talk about Mr. Darden. Just the State's case is all that I wish to talk about.

I honestly think that if we had done nothing, nothing at all, no evidence; if Mr. Darden hadn't been asked to take the stand, submitting himself to rigorous cross-examination; if we had done nothing; if, when Mr. McDanield said the State rests, Mr. Goodwill stood up and said the Defense rests, then you could not return a ver-

dict of guilty of murden in the first degree. You could not return a verdict of robbery. You could not return a verdict of assault with intent to commit murder.

Because, there is so much doubt here, so much unanswered with no attempt to get the answers, that you people have got to walk back in that room and ask yourselves why, why not, why didn't they give us something to work with here instead of coincidence and two people in shock. But they didn't bother to. They didn't bother, the Polk County Sheriff's Office didn't find it necessary.

So they come on up here and ask Citrus County people to kill the man. You will be instructed on lesser included offenses. I think that you will find it rather boring. The question is, do they have enough evidence to kill that man, enough evidence? And I honestly do not think they do. Thank you for your time.

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[VIII; 738-748]

[CLOSING ARGUMENT FOR THE STATE: MR. WHITE]

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MR. WHITE: May it please the Court, Your Honor.

THE COURT: Yes, sir.

MR. WHITE: Ladies and gentlemen, on behalf of Mr. McDaniel and myself, I want to thank you for your attention in this case. As Mr. Maloney stated, our job is about over. The evidence indicates one thing especially. That man sitting right over there is a murderer and I don't care what the Sheriff's Department didn't do, Mrs. Turman was on the stand and Mrs. Turman pointed to him and said, "That man murdered my husband."

Phillip Arnold was on that stand. Phillip Arnold points to him, "That's the man that shot me in the face." You don't need fingerprints for them to say them. You don't need tire tracks for them to say that.

Ladies and gentlemen, the Sheriff's Department of Polk County is not on trial today. Willie Jasper Darden is. Let's go through the evidence.

Mrs. Turman, Mrs. Helen Turman. Her husband, Mr. Turman, they run Carl's Furniture Store at 3730 New Tampa Highway. They don't any more. Mr. Turman is in the cemetery somewhere with a hole in his head, and Mrs. Turman shut the door, getting ready to close the store. Her husband was out with the dogs. Willie Jasper Darden walked in. She's with him 10 to 15 minutes.

The first part, she is treating him as any customer. The second part, she's scared to death of him. Ladies and gentlemen, somebody shot and killed your spouse in your presence, would you forget that person's face? Or would that face go with you to your grave?

I'm not talking about fingerprints, I'm not talking about tire tracks, I am talking about Mrs. Turman sitting on the stand and Mr. Goodwill cross-examining her for a half hour and not once did she waver and not once did she say maybe that's not the man, not once did she say maybe I am wrong. Every time, I am positive that's the man, no doubt.

Mr. Maloney forget to mention that to you. He forgot to tell you that Mrs. Turman has no doubt. He forgot to tell you that Phillip Arnold has no doubt.

Ladies and gentlemen, if those two don't have any doubt, why should you? Mrs. Turman saw her husband shot. A charge of murder, the first element. The State has to prove to you is that a man is dead. The doctor told you that he was dead. The doctor took the bullet out of his brain, and you passed that bullet among yourselves, and said that bullet was the cause of death, no doubt a man is dead. There is no doubt that man is Mrs. Turman's husband.

And the next element that killing, that murder has to be unlawful. It has to be from a premeditated design. Listen carefully. When the Court instructs you on the law of what premeditation is, there is no time minimum on it. You don't have to think about killing somebody for three minutes before you have the premeditated design. What it means is that you have the fixed, formed intent in your mind to kill somebody.

Mrs. Turman testified Willie Darden had her by the shoulder, had a gun in her back. Her husband came in the door and she said, "No, Jim, no"; that gun came from her back, went over her shoulder, and the bullet was discharged between his eyes.

Ladies and gentlemen, when Willie Darden took that gun from her back and lifted it and pointed it and fired it, what did he intend to do? What did he intend to do —he intended to kill whoever came in that door. He didn't know who Jim was. It could have been you, it could have been anybody. Whoever walked in that door at that time was a dead man as far as that man sitting over there is concerned.

You cannot deny Mr. Turman's testimony. After Mrs. Turman was Mrs. Hill. Mrs. Hill heard four shots. Mrs. Hill saw the greenish colored car go away with a black male in it.

Al Brady, who was at the scene of the accident said it was a greenish-gold car. Both of them said late model Chevrolet. The accident was a little more than three

miles down the road, just a few minutes later. It was the same car. Mr. Stone testified that he saw this man sitting before you today pulling up his zipper, buckling his pants. Mrs. Turman told you that that same man unbuckled his pants and pulled down his zipper a few minutes before. She didn't see him pull it back up. Is that a coincidence, that both could identify the same man? That one could see him pulling down his zipper and a few minutes later, one could see him pulling it back up? It's not coincidence. It's the same man both times.

Mr. Maloney admitted to you Mr. Darden was in the accident. Mr. Maloney admitted to you that this was a heinous crime. Mr. Maloney admitted to you that Mrs. Turman was robbed, that Mr. Turman was murdered, Phillip Arnold was assaulted by somebody with intent to murder him.

Let's to to that third count in your indictment, assault with intent to murder. That means when somebody assaults you and in their mind they mean to kill you. Somebody puts a gun in your face and fires it, what do they mean to do? Joke around with you? Miss? They mean to kill you.

While we're on that, what can they tell you that would wipe away Phillip Arnold pointing to the man with no doubt in his mind? Now, they're going to tell you he was mistaken, he was under pressure.

Ladies and gentlemen, if somebody put a gun in my face and fired, he wouldn't have to shoot again. I would be dead then of a heart attack, especially when I wasn't expecting it. What did that 16-year-old boy do? He tried to get up. He was shot in the mouth. He was shot in the throat, he was shot in the side, in his back. And he kept running. That was acting under pressure. That was cool under pressure.

Now, are they going to tell you that somebody that keeps his head under such extreme circumstances was in that state of mind that he could not identify the man? He could, and he did, more than once, in this courtroom before you today.

Rather than talking about what the State doesn't have, you ought to look at what the State has. Look at the

testimony. Dr. Mezger, the man is dead; this bullet killed him. Mr. Cunningham, I examined the rifling, the right twist, this bullet could have come from this gun.

Mr. Maloney told you there were thousands of those guns. Mr. Cunningham told you it was a collector's item.

Then we get to the last State witness, Dan Weatherford. Mr. Weatherford found that gun 39 feet from the accident the next day. This is how he found it. This is the fired pin, looking at it right now. You are at the actual handle of the gun, I am the barrel right here. This is what you're looking at. This is how he found it.

Let's see how we can make it be that way. If this is the one, if this is the shot right here that was under the hammer when this whole episode started; fired, Mr. Turman's brain, empty chamber; a click, and Phillip Arnold's face, fired, right into Phillip Arnold's mouth; fired, right into Phillip Arnold's throat; fired, right into Phillip Arnold's back. When that would happen, it would look just like that.

You remember Mr. McDaniel had Dan Weatherford set that gun with the live remaining shell under the hammer and remember, he had him fire five times. Remember, Mr. Weatherford opened up that gun and it looks just how he found it, one shot into Mr. Turman, one click, three shots into Phillip Arnold.

Ladies and gentlemen, the State proved to you that that gun was found 39 feet from that accident. The State would not put a witness on that saw Willie Darden throw that gun there. That's because only one man can testify to that, Willie Darden. He didn't. Nobody ever thought for a second he would.

You have got murder, you have got premeditated intent, you have got a dead body that you have to account for. You have got two people who pointed to him, no doubt whatsoever, and said that man right over there sitting beside Mr. Maloney is a murderer. And it's not hard to believe, because when something serious, when something tragic happens to you, you remember it, it goes with you to your grave.

You have got robbery, you have got money in a cash register that belongs to that store, that was in the cus-

tody of Mrs. Turman that this man over here yanked out after he had a gun; necessary element of robbery is when you take something. It is robbery if you take it with force or threat of force.

Would each of you, if you had money in your custody and the man comes up to you with the gun and says if you cooperate, you won't get in trouble, or something to that effect. Would you give him the money? You're durn right you would, because he threatened you, to use force. He had the gun in his hand plain and visible.

You have assault with intent to commit murder. Had that Arnold boy died, that would be murder. Of everybody you have seen today and seen throughout this trial, I would wager anybody who has been in this room this whole day, the luckiest person is Phillip Arnold. Willie Jasper Darden probably wishes he were dead, that would be one less eyewitness. That's why Phillip Arnold was shot at anyway. Phillip Arnold fooled Darden, he lived. He walked into Court and he pointed at him.

Ladies and gentlemen, that's eyewitness. You have heard Mr. Maloney stand before you and tell you how good fingerprint testimony is, how good tire tracks are. Ladies and gentlemen, the best kind of evidence in the world is a man that saw it happen, an eyewitness.

Mrs. Turman had nothing to gain by pointing to Willie Darden. She had already lost everything she had in the world, her husband. She doesn't have another one to lose, no need to point at a man that didn't do it.

Phillip Arnold has nothing to gain by pointing to a man that didn't do it. He is already carrying a bullet inside him today. If he points to the wrong man, that bullet won't leave him, it will stay there. In fact, there is only one man, only one witness that testified before you today that has anything to gain or lose by what he says, is Willie Darden. Everybody else had no reason to lie.

I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life.

[VIII; 749-781]

[CLOSING ARGUMENT FOR THE STATE: MR. MCDANIEL]

MR. McDANIEL: Ladies and gentlemen, I want to thank you for a week, I want to thank you for your time. I assure you that it was necessary under the circumstances, to use your time opposed to a week of our time. I want to assure you of something else. I'm not emotionally involved with Mr. Darden, Mrs. Turman, and Mr. Arnold. I have no amimosities for Mr. Darden except that he committed this crime or these crimes.

Now Mr. Maloney and I am positive, and I assure you and I guarantee you that Mr. Goodwill will try the Polk County Sheriff's Office; he will try the Polk County Sheriff's Office; and he will try me. And he will try Mr. White. I guarantee that, because he has notes I gave him many years ago.

But let me tell you something. As far as I am concerned, there should be another Defendant in this courtroom, one more, and that is the division of corrections, the prisons. As far as I am concerned, and as Mr. Maloney said as he identified this man, this person as an animal, this animal was on the public for one reason. Because the division of corrections turned him loose, lets him out, lets him out on the public. Can we expect him to stay in a prison when they go there? Can't we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking?

Mr. Darden said, oh, I don't know, no, I can't know, it's all right to drink, it's all right to drink alcoholic beverages, except the last. Remember one comment he made? Unless, well, as long as they don't find out. Find out? He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash.

This man admitted that he is a prisoner, that he had a gun in his possession. He doesn't work, he is in the pool halls, he is in the bars, he is in the lounges. He is a prisoner, supposed to have been. He is not a prisoner. No, I wish that person or persons responsible

for him being on the public was in the doorway instead of Mr. Turman. I pray that the person responsible for it would have been in that doorway and any other person responsible for it, I wish that he had been the one shot in the mouth. I wish that he had been the one shot in the neck, instead of the boy.

Yes, there is another Defendant, but I regret that I know of no charges to place upon him, except the public condemnation of them, condemn them. Turn them loose to visit his family, to visit his family, that turns out his family is a girl friend in Tampa, his family is in, I think he called her his sponsor, his sponsor.

This sponsor, otherwise his girl friend, knew that he was a criminal—prisoner, I'm sorry, prisoner; knew, let him bring the gun into her house while he was on weekend furloughs.

MR. GOODWILL: Now, I object. There's been no testimony of this.

MR. McDANIEL: I'm sorry, I believe Mr. Darden testified to it.

MR. GOODWILL: I don't believe so.

THE COURT: The Jury are the judges of the evidence. As I told you before, ladies and gentlemen, you are the sole judges. Your memory of the evidence is what counts. Proceed, sir.

MR. McDANIEL: I believe Dr. Darden testified at first it was his house. He went by to see his property. His property? He is a prisoner. He is supposed to be. Mr. Turman is dead because that unknown defendant we don't have in the courtroom allowed it. He is criminally negligent for allowing it.

Some of the remarks I heard in the opening argument by Mr. Maloney that I want to remember I disagree with, with his interpretation of the law. You take the law from the Judge. He said that we are asking you to kill this man on this evidence.

Well, he is wrong, of course. I think he knows he is wrong. The Court will tell you at the end of the argument in the Jury instructions at this point, you are merely to determine his innocence or guilt, nothing else, whether he is guilty or innocent. And after you return

that verdict of guilty of first degree murder, robbery, and assault with intent to commit murder, the Court will impose a sentence on Count No. 2 and 3, which is robbery and assault with intent to murder, and then you will be asked at that time to go back and retire and advise the Court whether or not he gets the death sentence or whether he should get life.

That is an advisory opinion on your part, and it has nothing to do with this trial, and Mr. Maloney knows that. But I am sure that I want you to remember Mr. Maloney's opening statement, opening argument when he called this person an animal. Remember that, because I will guarantee you I will ask for the death. There is no question about it.

The second part of the trial I will request that you impose the death penalty. I will ask you to advise the Court to give him death. That's the only way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it. It's the only way that anybody can be sure of it now, because the people that turned him loose—this man served his time and if this man served his time as the Court has sentenced him, that's fine. If he's rehabilitated, fine. But let him go home on furloughs, weekend passes—not home, strike that, excuse me—go over with his girl friend for the weekend, go shoot pool for the weekend, go sell his guns, or gun, for the weekend, go consume drink in the bars over the weekend.

On voir dire, some people call it voir dire, I could care less, it's selecting the members of the Jury, Mr. Maloney said, and I wrote it down verbatim, the State's case is based entirely—he used the word entirely—upon two eyewitnesses.

But now, all of a sudden, when the gun comes in, I didn't hear the word entirely from Mr. Maloney. Well, I'm going to talk about the gun in a few minutes. The Court told you originally this morning the Defense attorneys would have an opportunity to make opening argument and Mr. White and myself would split our argument, which we're doing now. Mr. Goodwill will then

come back and rebut everything I say. I cannot come back and say anything against what he says. I cannot rebut. I cannot rebut his argument. I cannot anticipate, but he will say everything possible.

I depend on each of you to do for me what I can't do. Mr. Maloney said, well, sure he had the accident, because they have all kinds of—the State has all kinds—I hate to use the word fancy fingerprints to prove it, but do you think he would admit that accident if he wouldn't have had that fancy fingerprint to prove it? No, he wouldn't have admitted nothing.

I don't know, he said on final argument I wouldn't lie, as God is my witness, as God is my witness, I wouldn't lie. Well, let me tell you something: If I am ever over in that chair over there, facing life or death, life imprisonment or death, I guarantee you I will lie until my teeth fall out.

What does he have to lose to lie? Nothing. Nothing. The only person who took that stand, Mr. Maloney said no one took that stand and lied under oath. He was wrong. One did. Sitting over there with a yellow shirt on with the stripe down the front at this time.

Mrs. Turman was on that stand the entire morning. A good part of it was cross-examination. The Defense attorneys, which I am proud to say that I was about seven years, attempted to break, get her to say well, maybe. No, well, yes, that's him, but. He kept after her for an hour and a half at my recollection, or an hour and 45 minutes to waver. Not once, not one time did that women waver. Not one moment did she ever imply that she wasn't absolutely, totally, and completely positive. That is the man that murdered the husband, and as Mr. Maloney said, shot the boy in the face twice, in the back—excuse me, the back side, the back, once.

And I will say at this point, maybe out of line, out of order, but neither did the Arnold boy. Neither did the Arnold boy, testify absolutely, positive, direct, didn't waver for one moment under any questioning at any time and as Mr. White said, he was under pressure. Oh, my goodness, how can you remember these things? He was under pressure. He remembers the gun in his

face. Mrs. Turman—I don't know how they're going to get around this. I'm sure they will bring up something. Mrs. Turman was under pressure at one point, a great deal of pressure at one point.

But the first time that Darden was in there, she wasn't under that pressure. He went in the store, all the way to the back door with Mrs. Turman, and her husband was outside. And when Mrs. Turman—he circled the entire store for the sole purpose of making sure no one else was in the building and had Mr. Turman not come through that back door, Mrs. Turman would not have been on the stand yesterday.

Do you have any doubts about that? Did he buy anything? No. Did he circle the entire store to make sure no one else was there? She wasn't under pressure then. She was under pressure a few minutes later. When he said he would be back or his wife would be back, and she turned back to her desk, walked back to her desk and then somebody closed the west door of the building that she couldn't see from her seat at her desk. And then Darden comes back. With this—this lady, robbed her. Well, robbery is a horrible offense, but if he had just taken the money and got out, fine. But he didn't do that.

So, he is not only a robber, in his lust and in his greed, not just robbery for profit. If he had just robbed that poor lady and walked out, gotten in his car and went back to his girl friend's house and then went home Monday to the prison, that's one thing.

But then, in his greed and in his lust, gets to him. He takes the woman to the back where he had already been and as she said to the room by the back door—started back there, I'm sorry, where some mattresses were. We found out later why.

Mr. Turman, not knowing anything happened, not knowing what was going on. I wish he had had a shotgun in his hand when he walked in the back door and blown his face off. I wish that I could see him sitting here with no face, blown away by a shotgun, but he didn't. He had no gun. He had no chance. He didn't give it to him. With a gun in the woman's back about

to attempt his lust, his greed, the poor man opened the door and he shoots him between the eyes. Between the eyes, isn't that enough? Not for Darden it's not enough. There's more.

Now the robbery is over and now the murder is over, still not enough. All right, Mrs. Turman—Mr. Turman lying half in the building, I am sorry, mostly on the ground with one foot, I believe was in the building, and he slammed the door on the foot in the door and even at that point, four or five feet away, remember her testimony that he unzipped his pants, takes it out and tells the poor woman sitting on the floor to take her teeth out. I wish someone had walked in the back door and blown his head off at that point.

But he is lucky, the public unlucky, people are unlucky, it didn't happen. Mrs. Turman saved herself by praying of a crime by refusing because her husband was already lying with the bullet in his forehead between his eyes. She knew, or should have known it was murder on the spot. She refused, none of these facts are denied, she refused. She begged and she pleaded, sitting on the floor, looking up at that, that in his hand. Then Darden said something, got back to the cash register, with Mrs. Turman's testimony, was a few feet back in the hallway directly in line with the back door. These photographs you will have to take back in the Jury room with you, if you like, and again the gun.

Mud on the ground, outside the back door. The cash register, got back I believe in this area and the boy came in. I got the impression from Mr. Maloney that we ought to try Mr. Arnold. Why did you sent that 16-year-old boy over there? Well, I'm not going to try Mr. Arnold for sending Mr. Arnold, the senior Mr. Arnold. We are not trying that. The boy in an act of mercy, attempting to assist the man, and Darden—the boy asked for some help to get the man's head and body in out of the rain.

He asked for some help, and Darden said, "Sure, man, I will help you, sure I'll help you." The boy looks back up. He reaches down to, I think he used the words

squatted back down to Mr. Turman, and he looks back up and he has a gun in his hand, in his face, in his face. I believe the boy said two feet away.

And click, the trigger. Remember the click. I will explain it later. Right in his face, cold-blooded, calculating murder. I can't use any worse words than murder. I can think of some, but I can't use them.

Then he pulls the trigger and shoots a 16-year-old boy in the mouth from two feet away. What saved the boy? The only thing I know is, into the mouth, the boy is kneeling down and didn't have a direct angle to the brain or the back of the spine, but the boy is still moving, and Darden doesn't like people who move after he shoots them in the mouth.

So he shoots him in the neck. But, my gosh, the boy is still moving. Again the angle of the bullet, because he is standing up looking down at the boy. In the neck, Darden got unlucky for a change. Finally, Darden is losing his luck. The bullet didn't go in the spine. It lodges in the neck. The boy is still moving, and the boy runs and Darden takes aim and fires again into the side or back, whatever you want to call it. But Darden's luck again, he loses again and hits the ribs and comes back out the shoulder.

Up to this point, the boy had run down the road, but with it in the mouth, the side, the neck, with blood. Darden can't go back after Mrs. Turman this time because the boy then has gone out. He has lost the body this time, he is on the run. He can get help. He may not be able to talk with his two .38's in the mouth and what Darden thought was one in his back, but Darden then went to his car and left.

Mr. Goodwill said, in one of his examinations. I believe of Mrs. Hill—

(Discussion off the record.)

MR. McDANIEL: Mr. Goodwill said Mrs. Hill, isn't it possible—I believe this was Mr. Maloney—you remember, not me. Isn't it possible that this car that you saw coming in the driveway was merely turning around, had been coming from Tampa and was turning around

and going back? Did you see anyone get in that car? No, sir, it was moving when I saw it. The colored male or a dark-skinned white man, that's exactly what she said.

But Mr. Maloney, isn't it possible, isn't it possible that he was merely turning around? What difference does it make if he claims he didn't do it? That was one of the few times that Mr. Darden didn't break down on his trip from Tampa. That's one of the few times he didn't have car trouble, was in front of the Turman's residence. What difference does it make whether the car was turning around, turning upside down or what, if he wasn't doing it.

In fact, let's not forget one thing. Mr. Maloney says there is no question, Mr. Darden had that accident? Mr. Darden, was just returning from taking a friend home, going back to his home—that was home from prison, he was going back home to his girl friend. Let's not forget only one person in this courtroom these past, only one witness this past five days has been able to hear every word spoken from that stand before he took the stand, which is a right the other witnesses did not have.

Mrs. Turman and Mr. Arnold took the stand without being able to hear each other's testimony and they both testified under oath they had not talked about the crime since it happened. Are they liars? But he heard every word everybody said, and I assure you, if we hadn't been able to prove the accident, they would never have admitted it.

But the fingerprints, they have always got the answer. We had the eyewitness. Oh, the eyewitness was no good. You have got to have that fingerprint. If you have fingerprints, oh, no, you've got to have—that's just circumstantial, you have got to have that eyewitness.

No matter what you have got, you have got to have something else. What you have is no good, and that's what he's going to tell you.

There is one person on trial, not the Polk County Sheriff's Office, not the Hillsborough Sheriff's Office, but he and his keepers, the Division of Corrections.

Ladies and gentlemen, last Tuesday morning, I made an opening statement to you. I have no contact with this crime except from the prosecution. But sometimes, it emotionally gets to me. For four days I have saw that man sitting there—calm, cool, calculating, collected, with his arms closed, smiling at the right time, until it came up time for his parole was in question, and then he goes to the stand with his handkerchief in his hand, ready to use it when Mr. Goodwill pops the right question about the parole. And then we cry.

I don't cry for him, I cry for the one who is dead. I cry for what happened on September the 8th, not for him. I ask him, did you cry when Mrs. Turman was testifying about the brains running out of her husband's head? No, sir. Did you cry when the boy testified about the bullet in his mouth, did you cry when you talked about your running and chasing and shooting him in the back? No, sir. He cried only when it served his purpose, when he is hurt. It may not have been only his parole. I wonder, I just wonder if he hadn't been caught in this particular crime, if he hadn't had that accident 3.4 miles away from this murder, he would still be in the public on his furloughs, visiting his family, shooting his pool, selling his gun, drinking his whiskey.

He's even got a driver's license. Why in the world does—what in the world is a State prisoner doing with a driver's license? I wonder if the public is paying for it.

Remember the Jury instructions, listen to them very carefully, please. Listen to what the Court tells you about the credibiliy of a witness, what you can use, what guidelines you use to test the credibility of a witness. And I'm not going to read them all to you, I'm just going to read a couple little things about the credibility of a witness.

I want you to apply it to every State witness. Impeachment, the second page after credibility of the witness, as you will hear the Court say: A witness may be discredited, the weight of his testimony may be weakened or destroyed by proof of (1) that the witness may at another time made a statement which was incon-

sistent with his present testimony. All these other witnesses made statements in the past. Mr. Goodwill sat there very faithfully going through it. You couldn't hear Mr. Darden until yesterday, after he heard all of the other witnesses.

(2) that the witness has been convicted of a crime. He admits that, doesn't know how many times. He is on furlough and don't know how many times he's been convicted of a crime. He tells Mr. Goodwill three or four and he tells me four or five. He doesn't even know. What is it?

There are a couple of other things the statement of a witness is inconsistent with the testimony of other witnesses or established facts. Apply that to Darden. They always use the argument of circumstantial evidence. That's no good. Mr. Maloney said we only had eyewitnesses. Let's wait until we get to the gun in a minute. Circumstantial evidence. If you have a 10-year-old boy and he is locked in a room at your home, and no windows and no doors, and he is in there alone, locked from the outside, and you go in the room and he is sitting on the side of the bed, the only person in the room, and there's a cigarette burning in the ashtray, smoke pouring from it, down halfway, and you say "Have you been smoking?" And he says, "Oh, no," what do you do? You believe him?

What Mr. Maloney and that says, Mr. Darden, I am going to ask you the same thing. Don't compromise your verdict, please. Do no compromise your verdict. It must be unanimous. Twelve of you must agree. The man is either guilty or not guilty. I'm asking the same thing the Defense has—don't compromise. You will get an instruction on alibi. Listen to it very carefully and remember Mr. Darden's testimony. He had been to Lakeland, didn't know where Auburndale was, but Dakota Avenue, Lakeland Hills Boulevard, left someplace at five minutes to one, got home at 17 minutes to seven. I couldn't even tell you right now what day I put a witness on the stand this week. If I thought about it, maybe I could remember, basically, Mrs. Turman, Phillip Arnold, Mr. Weatherford, 17 minutes to seven, five minutes to one. Are you going to

drive in five minutes from the north part of Tampa to the south part of Tampa? Why even make the trip?

All of that time he had to be back in Tampa at six o'clock for the little wedding. He didn' even bother calling anybody and telling them he wasn't going to be there. He had to be there, he had to be there, but he didn't even bother calling anybody telling them he wouldn't be there. So I assume they didn't get married or the poor guy she married didn't have a best man. He never called. He never called, remember? I asked him. He never called from Lakeland, Polk County, Hillsborough County, Tampa. When he came home he didn't call, nobody called.

He said no one called on his behalf. Lie detector test. That's the red herring they would like to throw in. I don't believe anything he says, but he said that he asked Officer Neil in Tampa, Hillsborough County Sheriff's Office to give him a lie detector test. No, I am sorry, strike that. He said Mr. Neil asked him if he would take one. He said, sure, with my counsel.

Well, only an incompetent lawyer would allow Darden to take a lie detector test. And that prisoner, with those convictions on his record, knows that.

Then he asked some jailer, he couldn't remember his name, but he could remember the name of that poor radio operator he asked to call about the wrecker. I don't know whether he asked his own attorney or not. I could care less. The Court is going to tell you later that if you have any questions about anybody's testimony, you can ask the Court to read back a portion or whatever portion of that testimony you would like to hear.

If Mr. Goodwill's memory is different from mine, ask the Court to have that testimony read back to you and the Court, I hope, will. If I am misquoting anything, and Mr. Goodwill says no, that's not right, and it's important to you, ask the Court to please have it read.

Poor Mr. Darden was so unlucky, when he gets out of prison on a weekend, he just happened to be riding by in the right time, the Turman's store, he just happened to be riding by at the right moment in the Tur-

man's store. He just happened to be riding in the same color car, although he says it is an antique gold. The rest of the witnesses are liars. He just happened to be identified by those two witnesses, independently and separately and unequivocally. He just happened to be riding on 92 instead of I-4. He just happened to be on a two-lane road. He just happened to be riding by at this point.

He just happened to have an accident two-tenths of a mile from the county line. Now, I don't think that the defense attorney seriously are going to question—I may be wrong—but I don't think they're seriously going to question that this bullet came from this gun. Remember the circumstantial evidence. What difference does it make if that's not Darden's gun? Why the hullabaloo about it? What difference does it make where the bullet comes from if this is not Darden's gun? What difference does it make what kind of gun it is if it is not his? It's his, it was his. It now belongs to the State.

All right, this is the gun. Mr. Darden's luck now goes—gets worse and worse and worse and worse. And now it just so happens he is so unlucky that he has an accident at this pole, and is just so unlucky that he has a gun found 39 feet from the post and the car is this way, 39 feet from that post and 39 feet from the edge of the pavement in a ditch. Isn't he unlucky?

All right, Mr. Weatherford testified that looking at the face of the cylinder—first, he testified that it was not buried in the mud and—take the gun back there and look at it, because does that look like a gun that was buried in the mud or buried in the water? No, it's only been in the water for that short period of time, 16 or 17 hours, long enough for the fingerprints to be gone. But he happened to find this gun right there, 39 feet from his car or his girl friend's car he smashed in the post. And let's see what the chambers look like. Mr. Weatherford says he picked the gun up. He picked the gun and turned it over, checked the barrel. So any—to see if there were any live rounds

in it, and then turned it back, looking from the hammer, very carefully pulled the chambers, opens it up, checks the plate.

Mr. Maloney couldn't remember how many shells are in it. Well, there were four spent shells and one live shell. This is the one we were using yesterday. Mr. Goodwill, you did not give any shells back yesterday. Do you have them?

MR. GOODWILL: I believe I did, sir. To answer your second question, no, I don't.

MR. McDANIEL: Okay. He's testified, Mr. Cunningham also testified that that cylinder turns to the left. As you fire the gun, pull the trigger, it turns to the left. I asked him to put the one marked in red—couldn't use a live one—under the hammer and pull the trigger. He did. When he was through pulling it five times, five times, because Darden shot Turman between the eyes; he clicked in the boy's face, that's number two; he fired in the boy's face, is number three; he fired in the boy's neck, is number four; and he fired in the boy's back, number five, saving one. Didn't get a chance to use it. I wish he had used it on himself.

Check the gun when you go back, please. See that it turns to the left. This is in evidence. This is the next shot coming out. The gun, Mr. Weatherford found it, the hammer was on this chamber. That's the bullet that went in the boy's back. Darden had pulled the trigger one more time, this one would have come up. This would have been next.

So, in reverse order, as you notice when the gun is on the live shell, kick this on up as it was when Darden started his shooting spree, shift this on up. When Darden fires this live shell, it moves out of the way, and the next one—this one was live. That is in Turman's head. That's the bullet that went in his brain. That's the one that killed Turman, right there. That's the one that clicked in the boy's face. That's the one that shot him in the mouth. That's the one that shot him in the neck. That's the one that shot him in the back. And Mr. Darden saved one. Again, I wish he had used it on himself.

Oh, the poor guy, Mr. Darden was so unlucky at so many—he happened to be the one that was unbuckling his pants. He was buckling his pants because of Mrs. Turman. He didn't unbuckle his pants. He testified that he took his—he hurt his chest in the accident. My God, do you unbuckle your belt to look at your chest? If you've been in an accident, do you undo them, drop your pants? All you would do is pull your belt down, pull your shirt up. He didn't go to the doctor. He didn't go to the hospital, went on to his girl friend's. He testified all this blood dripping down. I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time. Not in the accident, but on the pole. But then he testified about the blood dripping. What did Stone testify to? Again, the Defense says oh, Stone must have been mistaken or is lying. Mr. Darden wouldn't lie, he wouldn't lie to save his own life.

I asked you on voir dire, would you not assume or guess about evidence, the admissibility of evidence, as decided by our Courts; when we can get evidence in, it's decided by the Court; whether Defense gets evidence in, it is decided by the Court, and not you.

I asked you this week, and you said you would abide by that. But unfortunately, there will be some red herrings out. But, please, when you hear Mr. Goodwill testify—I am sorry, arguing—please remember that I don't have a chance to rebut him, anything that he says. I have to ask you to do it for me.

Mr. Darden, his convictions, left the scene of the accident. Why? He came back. He came back after he went home and washed up. Why did he take the shirt off? Why did he have the shirt in his hand? I'll tell you why. If you, on these steps down here, what is the first thing that you notice about a person? What is the first thing you see? If he has a coat on, you notice the coat. The second thing, if he doesn't have a coat on, you notice his shirt, what kind of shirt he has on. What did it look like?

But he put the shirt back on when he got back in the car with Mrs. Simmons. He got the shirt back on. But he went home—I am sorry, went to his girl friend's

house. Then comes back, because he knows the car can be traced to him. There's a bar across the street that he had no objection of walking in the bar at 8:30 or nine o'clock to make a phone call. But he didn't do that at six o'clock or 6:05 or 6:10. He has got to go home to his girl friend's.

You can make your own assumption of why. No phone calls, no wreckers. He stopped at one service station, he says, to get a wrecker in Plant City. That's what he says. I don't know that he stopped at any. What was he going to do with the wrecker when he got it? I guarantee you he was not going back to the scene of the accident until he had gotten home.

The bullet in the boy's mouth is a statement by Mr. Goodwill, I assume, why didn't it match that, that the boy had taken out the teeth and the bone and everything else, out of his mouth.

Mr. Cunningham says he is the expert. He told you that he couldn't even match four bullets that he fired from the gun himself with each other, because of the condition of the gun. Not because of any mud, but because it had been sent to England and rebored or something.

What difference does all of that junk mean? What has that go to do with a case if he didn't fire it? If it is not his gun, what difference does it make? If there's any question that this bullet from Mr. Turman's brain came from this gun, any question about Mr. Turman being dead, with a bullet in his brain; remember, Mr. Cunningham testified—remember Mr. Cunningham's testimony of your own, please don't remember Mr. Goodwill's testimony about Mr. Cunningham. He said this gun, although at one time was sold to the public, that it now is becoming a collector's item, a collector's item. What difference does that make if Darden didn't do it, if it's not Darden's gun? It's his gun, and don't forget it, please.

Don't forget, please, about when Mr. Goodwill gets into five foot six and five foot eight, 185 pounds, 200 pounds, don't forget what he has done according to those

witnesses, to make every attempt to change his appearance from September the 8th, 1973. The hair, the goatee, even the moustache and the weight. The only thing he hasn't done that I know of is cut his throat.

MR. MALONEY: Your Honor, that's about the fifth time that he has commented he wished someone would shoot this man or that he would kill himself. I wish the Court would instruct Mr. McDaniel to stick with what little evidence he has.

MR. McDANIEL: You don't have any evidence yourself, Mr. Maloney.

THE COURT: All right, gentlemen. Proceed with your argument. Objection will be overruled. Go ahead, sir.

MR. McDANIEL: There was a statement made by Mrs. Turman that I want to comment upon. That was, she said, Darden made the statement your husband owes me something. Mrs. Turman said she didn't know what it meant. I don't know what it means either, but I have an idea what that little statement meant.

I don't think it had anything to do with the bill, either. Mr. Goodwill is going to argue something about —let me state this: Mr. Weatherford testified about this, or Mr. Brady, that this accident—there was people milling around, numerous people around the scene of the accident, you know what I mean. People say things and do things that later no way you can find out.

Mr. Weatherford made a statement that someone said they saw Mr. Darden throwing something, the gun. Mr. Goodwill will say, where is the witness? Well, I guarantee you if we had one, he would be here. But why was all the policemen out there searching that day?

Mr. Maloney, talking about Mrs. Turman's testimony under pressure, he even said one time she was under pressure at the preliminary hearing in the courtroom, that he was the only black in the courtroom. Well, that's Mr. Maloney's testimony now, and not Mrs. Turman, that he was the only black man in the courtroom. Remember that.

But Mr. Goodwill turned to Mr. Maloney, now, after four or five months, was that man in the courtroom?

That man? Yes, sir, he was. No, I don't agree with Mr. Maloney that nothing I say is important. Maybe it's not, but I hope so.

I'm going to ask you, in closing, that you consider the direct evidence, the direct evidence, and as Mr. Maloney said, it's good evidence, the best evidence, the direct evidence, the eyewitness considered as circumstantial evidence, surrounding that wreck, the time, the place, his color, clothes, the gun, where he went, leaving the scene of an accident, and put them all together and don't turn this man loose. I cannot help but wish that the Division of Corrections was sitting in the chair with him. Thank you.

THE COURT: All right.

* * * *

[VIII; 782-819]

[CLOSING ARGUMENT FOR PETITIONER: MR. GOODWILL]

MR. GOODWILL: May it please the Court. The closing argument originally has not been planned to be long. We have all been at this a long time. I am sure we are all tired.

But in view of some of the things that Mr. McDaniel said, in view of some of the things that Mr. White said, perhaps more importantly, the way that they were said, the manner in which they were expressed to you, I feel an absolute obligation to cover these things. I don't want to be long-winded about it, but I believe as the Judge told you at the beginning of this, the purpose in our getting up here is to try and help you, not harangue you, not try you, and this is the impression that I got from the State's closing argument.

They're looking at you people and they're trying you. You know, what's the necessity in yelling? Were they talking to you, with you, or at you? One of the first things that Mr. White said was that it didn't matter, he didn't care what the Sheriff's Office had done.

Well, at the beginning of the trial, when we were picking you, the Jury, some of the things that were inquired into were reasonable doubt, would you require the State to prove the Defendant's guilt beyond and to the exclusion of every reasonable doubt.

He will instruct you that this must be done by clear and convincing evidence. For this reason, it becomes important what the Sheriff's Office did or did not do. Mr. Maloney talked to you about lack of evidence. This crime was committed on September 8th, 1973, over four months.

You heard or could assume from the testimony of the police officers, that the investigation started immediately. They were on the scene right away. They have had the opportunity and a little over four months to bring you tangible, concrete things that you can look at that can remove any questions.

By the Sheriff's Office, yes. And for that same reason, I try the prosecution because I believe that you people are sitting there, and a week ago you probably

never figured you would even be on a Jury, and in the second place, you knew absolutely nothing about this case.

Now, we have talked about burden and who had the burden, and the burden is on the State. The burden was to give you everything that they could possibly give you to remove from your minds any question of reasonable doubt that this was the man that committed the crime that he was charged with.

It's not a time to hold back evidence. If they have got it and it can help you, you want to have it. There are several things I will mention that all I can pose is the question, why didn't they? Why didn't they give you this?

I do agree with Mr. White in one respect. That the Sheriff's Department may not be on trial. I only accuse, I'm not saying they're on trial. But the quantum and the quality and the sufficiency of the evidence that these men present to you, that is on trial. That's what we're here for.

As expected, I knew Mr. White or, while on that line, sitting there and hearing Mr. McDaniel, I wondered if he had read my notes about my closing statement. He kept making the statement he is going to tell you this and he is going to tell you that.

And that's not important. What I tell you is important only if it helps you in reaching a decision, that's all. They have, by closing argument, in my estimation, tried to convict that Defendant, not on the basis of the evidence, but on the basis of argument, argument.

Mr. Maloney went through the evidence, the lack of it, the total lack of it; there is more that I will mention to you. But this was a parade of the horribles. The picture is terrible, you know. The gun, to some people, is a fearful thing. Seeing a widow on the stand is hard.

Hearing a young boy, 16 years old at the time this thing happened to him, testifying, that's hard. But you have got to separate what is fact, from the attempt to make it sound so lurid, so horrible, that because of that reason and that reason alone, you must convict this man.

That's why I say I got the impression that they were putting you on trial. And you're not on trial. These things you will take back, and you will examine them. There's no question they are bad. The picture appalls me too. But, has the Court found, when the State introduced it, it was something that should be introduced and should be shown to you. It's part of the State's case. So don't be led astray by the viciousness, the horrible nature and the testimony, not as it relates to the facts, but just isn't it a shame that this woman had to come into the courtroom and say, again, what she said before?

As I said, the Judge will instruct you that from the evidence and from the evidence alone, you must make you decision, and it's all you can consider, is the evidence.

Let's get one thing out of the way right off the bat. I think during this trial. I heard five different colors of that car described. Why didn't the State show you the car? You could have determined whether it was green, as one witness said, or black, as Mrs. Turman said, or antique gold, as the Defendant said. Why didn't they show you the car? This might have helped, I don't know. There may have been a question in your mind, and it may have resolved the question about something, I don't know why. I don't believe it is reasonable. Perhaps and, of course, this is within your province and not mine, to depict a man chasing this boy for some distance down the road, as you saw in the picture, with his belt unbuckled and his zipper unzipped.

Believe me, I don't mean to be ludicrous, but I believe his pants would fall down. I think it would be very difficult. It's for you to decide.

Phillip got shot in the face from two or three feet by a .38 weapon, which I think we all know is a fairly powerful gun. What did it do to him when he got hit? Did he stand there and take a .38 slug in the mouth and just continue looking? The impact from that distance of a bullet of that size has tremendous force. It's going to tear whichever way it hits. Has he testified he was kneeling down? I'm surprised it didn't knock

him down. You saw him, he was a good, sturdy boy, a good-sized boy. I think that's probably the part that helped, was his sized opposed to the bullet size.

But that's the first one. And then that's followed with a second, and then he says, from the first time he saw the man and Mrs. Turman in the store, to the time that he turned and ran, I believe this is his testimony, was 25 seconds. I believe that was his testimony.

Again, this is within your province. He also told you that his prime concern was Mr. Turman laying there. He also told you that at one point his mind went blank. Now, this is one reason we are asking, where we are questioning the identification. No, I don't think the kid was lying. I think he is making an honest attempt to identify the man he believes to be the one, but I will get into identification in a minute.

Mr. McDaniel told you I would, and of course I'm going to get into it. But remember those facts, 25 seconds total time elapsed during that period of time, he gets two slugs in the face. He is leaning over Mr. Turman looking down, and he's really not paying attention to what's going on inside. I am sure his mind went blank, and at that time, that's when he made his identification.

Now, he made a point of the fact that this man has done everything in the world to change his appearance. Well, I don't believe he has. He has not grown a full beard, for example. He could have shaved his head, all sorts of things he could have done that would change his appearance. The one thing that did come out that he testified he didn't look the same as he looked that day, and they said how is it different?

Okay, that creates a problem. They are identifying him positively as the man who did it, and yet he doesn't look the way he did that day. So, how can they say, unless they are mistaken, that that's the man.

The State doesn't want to talk about what they don't have. They didn't, they talked about the little bit of evidence they did have and then Mr. McDaniel made an impassioned plea to how many times did he repeat? I wish you had been shot, I wish they had blown his face

away. My God, I get the impression he would like to be the man that stands there and pulls the switch on him.

I don't care whether the State wants to talk about what they don't have or what they do have, but if they have got something they haven't shown to you, then they have failed to provide you with adequate information that you need to make a decision of this magnitude.

We're not talking about petty larceny. We started this thing out knowing it was a serious crime, a crime which the man could receive the electric chair for. We all knew this. And I don't think there has been any levity on my part, on Mr. Maloney's part, on Mr. Darden's part, this is serious business. The description given by Mrs. Turman and the description given by Phillip immediately after which I inquired about, is different. It's different. She said he was about her height, Phillip said he was a big, tall man. He's a little shorter than he is. I think he said he was six two. So we have got, although they both come into the courtroom and point him out, we have got a disparity between their own testimony.

I will mention the question that I know is going through your minds, but I won't answer it right now. I will before I finish. How could they both be mistaken, or how could they be telling the truth, and how could this man be telling the truth? How do you match them up?

As we go through my comments, remember these little distinctions about the identification. There is such a thing as mistaken identification and if we have a question involving the mistaken identity, I think it makes it encumbent upon the State to give you anything that's helpful, again. They didn't do it.

I think Mr. White misquoted, I'm sure not deliberately, although it does become important from the standpoint of tangible evidence that you could look at, and that is who took the money out, and I believe the testimony was Mrs. Turman said that the assailant told her to open the cash drawer and take the money out, and give it to him.

This becomes relevant when we think about Mr. Brady's testimony about dusting. Mr. McDaniel raised in your mind the fact that Willie got lucky on Phillip Arnold and he didn't kill him, and we all know what happened to Mrs. Turman. Although she was never threatened.

He never threatened to kill her, before or after, she testified to that. So, I guess he is raising the presumption that what if they were all dead. Well, let me ask you this question: What if they were all dead? Has the State produced to make this man the man that did it, what evidence has the State produced, if those people were all dead?

Mr. McDaniel asked you to do certain things. I, of course, ask you to acquit my client. That's no big surprise, but I ask you another thing, and that is, through being harangued and yelled at, and had a man storm around the courtroom and slap the paper and be demonstrative, don't let him embarrass you into a verdict. Reach the verdict on the evidence.

Mr. McDaniel got up here and he really didn't talk too much evidence, he talked about how horrible it was and all of this. Then he proceeded to try the Division of Corrections. He tries Mr. Darden's girl friend who, by the way, the State could have also produced, she was along on that trip. He tries Mr. Maloney, and I think he was getting awfully close to trying me.

Well, we're only in this courtroom for one purpose, and that is to try the guilt or innocence of this man sitting at this table. What the Division of Corrections may or may not do or what I agree or disagree with their policies, or whether Mr. McDaniel agrees or disagrees with their policies, we're not here for that. You do that another time if that's an important issue.

Mr. Darden explained to you how he was furloughed, how you get out on furlough. What the requirements were, how you built up over a period of time, maybe, just maybe, when they called and found out who this car that belonged to a possible suspect, although the description that was given by Mrs. Turman to Officer Neil —possibly when they found out that this man was on furlough, the police called it quits and stopped.

I think we have an excellent example here of one of two things, either the State is withholding evidence from you, or the police fell into a trap which possibly is understandable after you have been in law enforcement for a period of time.

This circumstance is a man on furlough, bam, we have got him. He is black and he generally meets the description. And then they stop. Mr. Maloney said the State was asking for this man's death. Mr. McDaniel gets up first and says that he is not asking for death, and then goes on for 30 minutes telling—well, he told you this for sure, said after the trial was over, if you found him guilty and that's the only thing we're talking about at this point, is the guilt or innocence, by golly, he was going to ask for death.

In my cross-examination of Mrs. Turman, you will recall it was not vindictive, it was not attacking, but we discussed statements that she had given to the officers immediately after the event occurred and the deposition. The fine discrepancies. I never asked her if she was positive this was the man, I never asked her that question. The State asked her, but I never asked her.

The woman had been through enough, but she had identified him, and therefore, it was necessary to go through these things. I would suspect the statement made immediately after she says she was not in shock, although if you take the shock theory, you know, one or two ways. She was in shock and possibly her identification was bad. If she wasn't in shock, she gave a good statement and her statements doesn't match with this man.

Let me pose a question. Mr. Darden was on the stand yesterday. He took the stand and he didn't have to take the stand. The Defendant does not have to take the stand. We put him on the stand, we admitted he was in Avon Park. We admitted he had been convicted of a crime. We admitted he was on furlough. We admitted he was in an accident.

I know of nothing that we tried to keep from you, from Mr. Darden. Now if there was anything that he said that was untrue, he named names, names that have

been available to the State, and why didn't they have those witnesses in here to testify that it wasn't true?

His testimony stands as far as what he said happened that day with himself, uncontradicted. Now, those are some of the witnesses I think the State should have brought in and let you listen to. If I were prosecuting, I would have. If I have a man that said I went to a lady's house and my car broke down and she calls the place for me and calls another place for me and names the name—

MR. WHITE: Your Honor, the State is now going to object to this. Mr. Goodwill has just told the Jury that we had access to names that came from Mr. Darden's mouth.

THE COURT: No, sir, that wasn't what he stated.

MR. GOODWILL: I did not say from Mr. Darden's mouth.

THE COURT: I will overrule the objection.

Go ahead.

MR. WHITE: He stated, as I recall, maybe I misunderstood him. I understood him to say the testimony came from the stand.

MR. McDANIEL: I believe he said Mr. Darden, if you will read back. Have the court reporter read back. He said it came from Mr. Darden's testimony.

THE COURT: That's what he stated, that it came from the stand and the Jury heard the witness, and they can judge what he said is true or not. So he is not going outside the evidence. The objection will be overruled. You may continue.

MR. GOODWILL: Mr. Darden got up there and he named names. I was interrupted—we were talking about the first lady, made the phone call for him, to get the car fixed. That's an easy fact to prove or disprove. Did he come back over with the wrecker? Easy fact to prove or disprove.

If we assume for a minute that he did, in fact, come back over, is it reasonable to believe that a man that committed these heinous offenses would come right back to the spot, not by himself, but with a wrecker and two other people, to the very spot that night.

The wrecker driver could have been here, the girl friend could have been here, the other man that he named could have been here. They could have testified, for example, whether or not Mr. Darden went over there and looked around in the bushes for a gun.

Now, if this was, in fact, his gun, he had thrown it in the bushes, isn't it a reasonable thing that if he was going back over there, he was going back over to get that gun? Where is the witness that saw him throw it? They just passed that one off. They're investigating a homicide, a shooting of a young boy and a robbery. It's so important that the chief ID officer, instead of sitting at the scene of the crime and gathering some things that could be presented to you, had to leave there and go down to the other place.

If you recall, we told you that he was in the car. The State didn't even produce any evidence to show that he was in the car. We admit it. He had an accident. There is absolutely no question about it. These are witnesses that I think you should have had the opportunity to hear.

If, in fact, their testimony was opposite from what Mr. Darden testified to and the Judge will instruct you on the weight and the credibility to give witnesses, but you have a right to believe or disbelieve him, just as much as any other witness.

The preliminary hearing of Mrs. Turman, we went into that. You heard me ask her about this man, identified them, et cetera, et cetera. I ask you to look around this courtroom. How many blacks do you see in it? How many blacks do you see at Defense table? It goes to her credibility because by her testimony, that was the first time she had seen him. Now, is her testimony in this trial based on the man she saw on the day of the offense or, is it based on the fact that she saw this man at a preliminary hearing in a similar situation?

Let's go back to the cross-examination of Mr. Darden for a minute. You didn't see the yelling and screaming and righteous indignation and get up and blow your face off. You didn't see that then. You saw him lead him through the store and the man told the story as best he could tell it. You heard, well give me your best estimate. He did. He did.

Why no righteous indignation at that point? If the man felt that strongly about it, how could he even get up there and examine him? But you saw him stand right over here in this courtroom, and this podium was right over here, and he just coolly and calmly went through it. Thought he had him on the wedding invitation, didn't he? Could I see that? Took it back and boy, he examined it all over, and you notice he didn't say anything more about it? He slipped it right back up there and he gave it to Mr. Darden, because Mr. Darden had told the truth.

Why, when you have the Defendant on the stand and the opportunity to put him through the most serious, grueling cross-examination with the intent of breaking him down, you didn't see righteous indignation. You didn't see the yelling and the screaming and the pushing and the shoving and the hitting with the stick and the whole works.

Well, the possibility is that he was telling the truth and the State didn't have anything at all to disprove it. If they had something to disprove that statement it would have been on that stand, and you did not hear it.

And then we come in here today and we went back to what I said earlier. He tries to win you or embarrass you into a decision based on his argument, but not based on what came from that stand, and that will be one instruction that I want you to listen to very carefully that the Judge gives you. I think he instructed you briefly on on it at the beginning of trial, right up here, that's what you have got to pay attention to, and the evidence or lack of evidence, you can consider.

Mr. McDaniel made a big point about Mr. Darden crying on the stand. Well, he was upset. I haven't cried about the death of Mr. Turman, the shooting at the boy, I don't know them. I didn't know them. There was not reason for me to cry. Mr. McDaniel says why didn't he cry when this widow was testifying about all of this? I would suggest to you the same thing. He didn't do it and he didn't know them.

The point he broke down on when he started crying was the parole. None of you have been incarcerated, in

the same fashion, or you wouldn't be sitting on this Jury, and I think if I was a week away from parole, I'd probably be a little upset myself. Jails aren't nice places, so I think this. I don't know what point he was trying to prove by it, that's the point that I am making to you. I don't know what point he was trying to prove.

Again, I guess he appealed to your emotions, what I have referred to as a parade of the horribles. I have talked to this woman before, I talked to this boy before. You know it because you heard me ask questions about a deposition, and I took both of them. There is no question it was bad, it was horrible. It's unfortunate that the boy will have to go through life this way, it's unfortunate that she lost her husband in that fashion, but that's not evidence. That's an appeal to your sympathy.

Then get down to the issue of crime, I think you will recall that Mrs. Turman didn't cry either. An innocent man doesn't need an alibi any more than I need one or Mr. McDaniel needs one.

He said he couldn't put on, and so and so and so and so and so and so. And that's exactly right. I have difficulty myself. Ask me a question, where were you on a certain day and I don't know. Maybe I could tell you, but an innocent man doesn't need an alibi and there are times in everyone's life when they are somewhere where no one knows where they are. I have often thought under the right circumstances how you could take anyone, if you followed their patterns for a period of time, and put them in a position where they couldn't say where they were if something were directed in their direction, if it looked like they committed a crime.

Mr. McDaniel said this man didn't make a phone call. He asked about phone calls, phone call, phone call, phone call. I still don't know what he was getting at. Today the big secret comes out, he didn't call. But you all correct me if I am wrong, but I believe the testimony of Mr. Darden was he called from the filling station and the line was busy.

Did you hear Don Neil mention a request for a lie detector test? In fact, I don't know what they put him on the stand for. He got up there and I don't even re-

member the questions that were asked him, he was up there such a short period of time, came in, Don Neil so and so, and so and so, and he was gone. I wish they had left him on there a little longer, because if you recall, Don Neil was the one Mrs. Turman gave the statement to. He was investigating officer, and he could have told us what she said to him at that time, what her state of mind was, what her condition was, as far as the ability to recollect facts. They didn't do that. Slipped him in and slipped him out. Mr. Darden didn't call the radio operator, or why didn't the State produce the radio operator or the logs that they keep? They keep some kind of records. I assume that's true. If it wasn't true, they should have shown that it wasn't true.

Remember, theirs is the burden, not ours. We have no burden. We don't have to prove innocence, it's their burden. And after this trial, if you have a reasonable doubt for any reason, but if you have a reasonable doubt because there weren't witnesses put on the stand that should have been put on the stand, then that's a reasonable doubt, and it is just as valid and the reasonable doubt falls under the definition, as the Court will give it to you, as any other reasonable doubt.

Again, Mr. McDaniel tried to imply that I was trying to imply these people were liars about the cars. I was a little confused, because I heard so many colors, Again, why didn't they produce the car? Mr. McDaniel said the gun wasn't in the water very long. You heard testimony that, and I don't know how long that gun was in the water, the gun was submerged without air and it rusts. But because of the excellent police work of the Polk County Sheriff's Department, they don't take the remaining bullet, they don't fire it right then. I can't believe these men are stupid, but when you take a gun out of water, if you don't oil it or do something, it is going to get rusty, and the FBI man here said on the stand that the reason he could not determine conclusively the bullet came from the gun was because the barrel was rusty, in a rusty condition.

But what evidence would there be if Officer Weatherford, as I asked him, fired that other bullet right out of

that gun right then as fast as possible. I believe I asked him wouldn't that give you the best sample for identification of another bullet. He said yes. There is no attempt to fingerprint the gun. They are thoroughly convinced in their minds that this is the murder weapon, and they treat it like it wasn't important.

They have the facilities for fingerprints, they testified they did, and they had facilities for ballistics. And there are things that could have been done to preserve the condition of this gun so as a good sample could have been made? Yes. If you can come in, and if that FBI expert, their witness, had come in here and said, yes, unequivocally this bullet was fired from this gun, there would be no doubt. He didn't say that. It's quite the opposite.

I want you to examine this gun when you take it back. It's an interesting—it has writing all over it. I don't know, those of you who are familiar with guns, but look at it when you go back and notice the fact that up at the top, United States property, right across here. Excuse me, I don't mean to be pointing this thing at you.

JUROR: No, I was just changing positions was all.

MR. GOODWILL: Right across the top is United States property, Massachusetts, December 29, .38 special BRD. Those of you who are familiar with guns, this isn't just a normal gun, this is some things on there that a police officer ought to look at. I know if I had, well, this is the first one I have ever seen and I am interested in what all of the writing on here is all about.

Of course, we heard the history of the gun; we heard there was a lot of them around; and I think he said we would probably find there were a lot of them in closets that were sold before the Omnibus Act, a lot of these guns and he has examined, I can't remember whether he said hundreds or thousands of these he has examined. No one was shocked more than I was when he testified that this gun was used in an assassination. I thought he said the assassination of President Kennedy, but I don't remember what he said. You remember what he said about it. This is the gun has got

some things about it that should have been looked into. In my handling it, I've got fingerprints all over it, and as you handle it, look at it, and there's fingerprints all over it.

Ballistically, the gun cannot be tied to the killing. Fingerprintwise, it cannot be tied to anybody. The sum total of the testimony about this gun is that it cannot be identified as being related to this man in any way, except that it was found where it was found, across the street from a bar.

Let's talk about that for a minute. I believe Officer Weatherford, on my examination, testified to at least two ways that gun could have gotten there. Again, I bring up the fact, well, we heard somebody told us he had thrown a gun. Well, everybody rushed down there. The statements taken, isn't that important? Wouldn't it have been nice to hear from this stand for you edification so that you could reach a decision, I was there, I saw this man, and he took a gun, and I saw him throw it back there in the bushes. Unbelievable. This can be taken for whatever value that you want. Certainly it looks incriminating. It seems to indicate that it was the murder weapon. But even with this, you can't put this with that man. You can't do it. This is right across the street from a bar, from a lounge; Officer Weatherford, when I asked him about footprints, remember he said, no, there was no way of getting footprints. There were people all over there. The killer of Mr. Turman and the robber of Mrs. Turman, and the person that shot Phillip Arnold could have been standing there right then. Is there any testimony were there any other blacks around the area? Was there any testimony about, did you take statements from any of the witnesses to the accident except Mr. Stone and Mr. Maloney said Mr. Stone says, yeah, this is the guy and he's got a moustache. He had a moustache then.

Phillip Arnold said the man was clean-shaven, didn't have hair on his face. Mr. McDaniel says the first thing I look at is his shirt. Mr. Stone, someone looked at a

moustache, and it wasn't on my questioning, on the State's questioning.

Again, we have the question of identity. The State called Mary Simmons to the stand. She promptly got up there and this guy, this guy did it, he was in a wreck. Carried him to a filling station, he discussed getting a wrecker, got out of the car and talked to the man at the filling station. You heard his explanation of what happened at the filling station, and then they went on to Tampa and got a wrecker.

Their witness gets up there and corroborates what the Defendant later says. Now, they imply that he sat there and listened to the testimony all of the days. So what if he heard that? She corroborated what he testified to. There has been nothing shown to prove that what he said he did on that day was not true, not one scintilla, not in the slightest piece. All of it could have been checked out. All of it could have been brought before you, any lies, any discrepancies. Do you realize there wasn't any testimony, direct testimony as to the exact time of the accident from any police officers, from any investigating officer, from the Hillsborough County Sheriff's or the Florida Highway Patrol? None of that. I am telling you, you find the wrecked car, check it, in the meantime he is going back and forth, he is on furlough, bam, that's our man. And at that point it stopped.

Do each and every one of you remember Mrs. Turman describing how long the gun was? I believe she said it was about this long. The State asked her and I asked her and she said the same thing.

Identification. Assuming this was the murder weapon; if she missed on that, she could miss on other things. I realize this is being somewhat lengthy, and I apologize. I assure you I will try to hurry it as much as possible.

There are a few points of evidence that I would like for you to consider. An hysterical woman, a 25-second mind blank, that's your eyewitness ID. No paraffin test. I can't blame the Polk County Sheriff's Department for that. That could have been done over in Hillsborough County. That could have been done. No fingerprint. Al

Brady testified that he did not even talk to Don Neil, who was the investigating officer, and he is the man who took the statement from Mrs. Turman. I don't know what in the world they were thinking of that day.

Mr. McDaniel was trying to emphasize the seriousness of it and I would like to emphasize the seriousness of it. You have a man dead and a boy shot and a woman assaulted and robbed, and he is more concerned about going down the street to a possible suspect car instead of staying there at the scene. It was raining. He testified he knew or he should have known after 16 years as an ID officer that things that we could have seen in this courtroom were going to be destroyed by the rain, tire tracks, footprints, possible fingerprints on the outside of the door. She testified he reached up and pulled down the door. Was it dusted? No. Were any of the doors dusted? No. I asked him were any of the doorknobs dusted? No. Nothing was dusted. And think about that a moment. He said it was the not type of surface that was conducive to getting a fingerprint off of. I think you could safely assume that if he was an expert with 16 years experience, he ought to know something and he ought to know whether or not it's going to take. That even seems like a futile act. Stoves, he looked at stoves. This man was supposedly buying $600 worth of furniture. She didn't watch him the whole time he was in the store. Stoves, porcelain, refrigerator, oven doors, chrome that runs across the top of an oven door.

When I buy a stove, the first thing I do is open the oven. Fingerprints, solid, conclusive evidence. That's what has not been given to you. Mr. Brady also didn't say anything, that he found anything down at the site except the car. He didn't testify about any fingerprints on the car, and I suppose at that point, if we hadn't gotten up and admitted that the man was in the car, you wouldn't have had it.

We had to tell you that he was there. They failed miserably. No blood test, no lineup. Where is the shirt? No ID by the FBI on the gun. The question of time, on what time this even happened. The question of time by

Mr. Stone on what time he accident happened, 5:30 to 6:30, somewhere. Was the accident reported? If it was reported, we might have some testimony from the stand as to what time it was reported.

And that would narrow it, wouldn't it? That would tell us what time the accident was. You didn't hear from the officers, the original officers that responded. If there was one, you don't know that. Why not? What time was he dispatched? What time did he get there? It's a matter of record. They keep records of this. You don't have it. You don't even have a complete chain of custody of what has happened to this gun.

Weatherford gave it to Keeny and then, at some time later, Keeny gave it to Cunningham. Did you hear from Chuck Keeny? Was he on the stand? Did he testify about the gun. Did he say anything about it? Why not?

There is one thing I agree with, with Mr. McDaniel on, probably the only thing. This crime was committed by an animal. He had to be. You have observed the Defendant all of the days of trial, you heard his testimony. Unfortunately, it becomes your job to determine whether or not he was an animal.

Premeditation, the man that did it, whoever he was, well, Mrs. Turman said, it was instantaneous. That she started to say something to her husband and before the words even got out of her mouth.

You will get an instruction on premeditation. We feel, Mr. Maloney and myself, Mr. Darden, have tried to give you everything we had. We didn't hide anything. We didn't hide the man's prison record, we didn't hide anything. We gave it to you like it was, and there was absolutely no attempt except by what I, perhaps, considered to be a rather poor attempt at cross-examination of the Defendant. And Mr. McDaniel had the opportunity, if he wanted to prove to you, that Mr. Darden was an animal, was a liar, was the man that committed this crime, he had the opportunity. There was no time limit placed on him. He could still have him on there.

In closing, let me say this to you: That you will receive an instruction that states in effect that the State

is required to prove each material allegation of the indictment beyond and to the exclusion of every reasonable doubt before you can find this man guilty. Beyond and to the exclusion, if there is one thing we can all thank God for in this country, it's the fact that that right there, those words, have to go to a Jury of our peers, if we are tried in a Court of law, puts the burden on the State to prove it. No burden on us. In spite of this, we told you what we could.

Right after that instruction, you will be told by the Judge that it is to the evidence, the words, the pictures, the whole works, the evidence, and to it alone that you are to look for the proof. You can't prove him guilty on what Mr. McDaniel says, and by the same token, you can't find him innocent on what I say.

Right there. There it is. You consider it carefully. I think this case is rampant with reasonable doubt. It runs through it from the beginning to the end. Of course, it goes without saying that there is, as Mr. McDaniel got up here and wished all sorts of horrible things on my client, and asked you to find him guilty, I, of course, ask you to find him not guilty. But only on this, nothing else. This, and this man's testimony.

I appreciate your attentiveness, I know it's been hard to sit and listen. I find myself sometimes, no matter how interesting the conversation may be, there ain't no way you're going to keep me awake. But, in a matter of this—as great as this—I can truthfully say to you, that I think that each of you jurors have honestly and fairly listened and looked and observed the evidence. And this is all the Defendant in a criminal case can ask for, and I thank you for it. Thank you very much.

* * * *

[II; 209-210]

IN THE
IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT, IN AND FOR
CITRUS COUNTY, FLORIDA

Case No. GF 73-2027 C
Murder in the First Degree

STATE OF FLORIDA

vs

WILLIE JASPER DARDEN

JUDGMENT AND SENTENCE

WILLIE JASPER DARDEN, you were charged by an indictment duly found by the Grand Jury of Polk County and duly presented in the Circuit Court of Polk County with the crime of murder in the first degree, to which crime you entered a plea of Not Guilty. A change of venue was granted and this cause was transferred to this Court for trial. A jury of twelve citizens, duly impaneled to try you upon the charge of the indictment, after having heard all evidence in the case, the argument of counsel and charges and instructions of the Court, have rendered a verdict against you, finding you guilty of the crime of murder in the first degree as charged in the indictment, and, upon completion of the second or sentencing procedures of the trial, a majority of such jurors recommended that a death sentence be imposed upon you.

The Court has heretofore and does now again adjudge you to be guilty of the crime of murder in the first degree, as charged in the indictment. Now, you being before the Court, attended by your counsel, do you have any cause to say why the judgment and sentence of this Court should not be pronounced upon you?

No legal cause being shown in bar hereof, and the Court having determined that sufficient aggravting circumstances, as defined by Section 921.14 of the Florida

Statutes exist, and that insufficient mitigating circumstances exist to outweigh them, it is the Judgment of the Court and the sentence of the law that you, WILLIE JASPER DARDEN, for the crime for which you stand convicted, be delivered by the Sheriff of Citrus County, Florida, to the proper officer of the State Penitentiary of Florida, and by them safely confined until such day and time as the Governor of Florida, by his warrant may appoint, at which time by said warrant directed and within the chamber provided by law, you, WILLIE JASPER DARDEN be, by the proper officer provided by the Warden of said Prison, electrocuted until you be dead, and

May God have mercy on your soul.

DONE AND ORDERED in Inverness, Citrus County, Florida, this 23rd day of January, A.D., 1974.

/s/ John H. Dewell
JOHN H. DEWELL
Circuit Judge

[OPINION OF THE SUPREME COURT OF FLORIDA]

SUPREME COURT OF FLORIDA

Nos. 45056, 45108

WILLIE JASPER DARDEN, APPELLANT

v.

STATE OF FLORIDA, APPELLEE

Feb. 18, 1976

Rehearing Denied April 19, 1976

BOYD, Justice.

Pursuant to Article V, Section 3(b)(1), Florida Constitution, this Court takes jurisdiction over a direct appeal from a final judgment imposing the death penalty.

Carl's Furniture Store in Lakeland, Flordia was robbed on September 8, 1973. During the course of the robbery, the proprietor, Carl Turman, was shot and killed and a neighbor boy, Phillip Arnold, was wounded. Soon afterwards, the Appellant, Willie J. Darden, who was on furlough from the Division of Corrections, lost control of the borrowed automobile he was driving and smashed into a telephone pole some three miles from the site of the murder, assault and robbery. After returning to his girl friend's house in Tampa that night, the Appellant was arrested on a traffic charge, leaving the scene of an accident. Soon thereafter, he was arrested and charged with murder, assault with intent to commit murder, armed robbery, and assault with intent to commit rape. The grand jury returned indictments charging first degree murder, robbery, and assault with intent to commit murder in the first degree.

Both before and during trial, Mr. Darden was identified as the guilty party by Phillip Arnold and by Mrs. Helen Turman, the decedent's wife, who was present and

assaulted during the commission of the robbery and murder. The trial jury found the defendant guilty of murder in the first degree, assault with intent to commit murder in the first degree, and robbery. After the second phase of the bifurcated trial mandated by Florida Statutes Section 921.141, the jury recommended the imposition of the death penalty. After enumerating its findings of aggravating and mitigating circumstances as required by Section 921.141, the trial court sentenced the Appellant to death by electrocution.

Appellant alleges eight grounds for reversal. The racial composition of the venire, the exclusion of prospective jurors because of their expressed attitudes toward the death penalty, and the alleged unconstitutionality of the sentencing provisions of Florida States Section 921.141 provide three of these grounds. Another is the court's eliciting from a state witness a comment regarding other murder cases in which Darden was, at least initially, a suspect. The courtroom identifications of the defendant by Mrs. Turman and Phillip Arnold respectively, are alleged to be tainted by impermissibly suggestive pre-trial procedures and provide two more allegations of reversible error. A further ground is the allegedly erroneous admission into evidence of a gun asserted to have been used in the holdup and murder. Appellant's final point on appeal is that certain remarks made by assistant state attorneys during closing arguments were so prejudicial to Appellant's cause as to require the granting of a new trial.

We have reviewed all the points raised on appeal by the Appellant and conclude that only one merits consideration for reversal of the conviction below, i.e., whether statements made by the assistant state attorneys in closing argument were so inflammatory and abusive as to have deprived the Appellant of a fair trial. The law requires a new trial only in those cases in which it is reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt that it would have otherwise done or in which the comment is unfair.

It should be noted that the first denunciation of the criminal who committed the acts was by Appellant's own attorney, who made the following statement to the jury:

> "I intend to just briefly summarize the evidence that has been before you. I'm going to attempt to be as objective as possible. The first witness that you aw was Mrs. Turman, who was a pathetic figure; who worked and struggled all of her life to build what little she had, the little furniture store; and a woman who was robbed, sexually assaulted, and then had her husband slaughtered before here eyes, by what would have to be a *vicious animal.*" (emphasis supplied)

The defense counsel was saying only that the person who committed the crimes was an animal, and he would have had the jury find that someone other than Appellant was the perpetrator of the criminal acts. Although Appellant further complains of the expression of his personal views by the Assistant State Attorney about Appellant, the defense counsel made the following statement which showed his personal reaction:

> "But can you get the pistol back to Mr. Turman? Can you get the pistol back to Mr. Darden? No, we can't do that, but we got the pistol, and it's good enough for us. *It's not good enough for me. I wouldn't do what you're being asked to do on that, really, I* wouldn't . . . ." (emphasis supplied)

The record shows the following remarks were made in the State Attorney's portion of the closing arguments:

> ". . . *As far as I am concerned, and as* [*defense counsel*] *said as he identified this man, this person as an animal, this animal was on the public for one reason* . . . (emphasis supplied)
>
> * * * *
>
> ". . . *I am sure that I want you to remember* [*defense counsel's*] *opening statement, opening argument when he called this person an animal.* Remember that, because I will guarantee you I will ask for

> the death. There is no question about it. (emphasis supplied)
>
> "The second part of the trial I will request that you impose the death penalty. I will ask you to advise the Court to give him death. *That's the only way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it* . . . . (emphasis supplied)
>
> * * * *
>
> "I don't know, he said on final argument I wouldn't lie, as God is my witness, as God is my witness, I wouldn't lie. *Well, let me tell you something: If I am ever ever over in that chair over there, facing life or death, life imprisonment or death, I guarantee you I will lie until by teeth fall out.* (emphasis supplied)
>
> "What does he have to lose to lie? Nothing. Nothing . . . .
>
> * * * *
>
> "Mr. Turman, not knowing anything happened, not knowing what was going on. *I wish he had had a shotgun in his hand when he walked in the back door and blown his face off. I wish that I could see him sitting here with no face, blown away by a shotgun,* but he didn't. He had no gun. He had no chance. He didn't give it to him. With a gun in the woman's back about to attempt his lust, his greed, the poor man opened the door and he shoots him between the eyes. Between the eyes, isn't that enough? Not for Darden it's not enough. There's more (emphasis supplied)
>
> * * * *
>
> ". . . *I wish someone had walked in the back door and blown his head off at that point.*" (emphasis supplied)

In light of the "animal" characterization by the defense, when the jury found Appellant guilty, the statements of prosecuting counsel that Appellant was an animal do not seem unduly inflammatory. It seems inappro-

priate to reverse the State's conviction because the prosecutor was making the same alleged errors as defense counsel.[1] A careful examination of the record leads this Court to conclude that, although the prosecutor's remarks under ordinary circumstances would constitute a violation of the Code of Professional Responsibility, in this particular case they amount to harmless error when the totality of the record is considered in these uniquely vicious crimes.

Let us briefly review the conduct condemned by the prosecutor. Appellant was a career criminal who admitted at least five convictions and who was on a weekend furlough from the state prison to visit his family when these felonies were committed. His family, including his wife, was out of the State, so Appellant stayed with another woman in Tampa. On the day of the crimes he took the woman to work and then used her car to visit various bars where he drank alcohol and gambled in a pool hall contrary to standards imposed by the condition of the furlough, even neglecting to pick up the woman when she left work.

Appellant said he was paid to drive an unidentified stranger named Roy to Lakeland, that he had car trouble, and that he was racing back to Tampa where he was supposed to be best man in a wedding. He admitted speeding in a rainstorm and creating great danger to other motorists when he wrecked the car on the same road taken by the killer according to witnesses. The wreck was near the murder scene and occurred about the same time as the crimes; furthermore, the car Appellant drove fit the description of the getaway vehicle used by the criminal after his crimes were committed. The pistol admitted into evidence was identified as probably being the death weapon and was of the same type; it was found the day after the killing, robbery and attempted murder only thirty-nine feet from where Appellant's car was wrecked. Four cartridges had been fired, the very same number fired at the scene of the crime.

[1] *Cf. Arline* v. *State*, 303 So.2d 37 (Fla. App. 1974).

The record shows that Appellant first robbed Mrs. Helen Turman and that, when her unarmed husband Carl started to enter the store, Appellant shot him between the eyes scattering blood and brains. As a sixteen year old boy, Phillip Arnold, tried to aid the wounded man, Appellant shot him in his mouth, neck, and side, leaving permanent injuries, including a bullet still in his neck at time of trial. While her bleeding husband lay in a rainstorm at the door. Appellant tried to force Mrs. Turman to commit an unnatural sex act upon him at gun point. She refused, and after shooting the boy Appellant left the area.

How is it possible to use language which is fair comment about these crimes without shocking the feelings of any normal person? The language used by the prosecutor would have possibly been reversible error if it had been used regarding a less heinous set of crimes. The law permits fair comment. This comment was fair.

When the work product of a criminal is a mortally wounded husband, a wife who is sexually assaulted and robbed, and a sixteen year old boy who is shot three times while trying to help the wounded man, there is little basis to complain of the State Attorneys' expression in reasonably describing what happened and what should be done to the guilty party.

There was overwhelming eyewitness and circumstantial evidence to support a finding of guilt on all charges and a recommendation of a death sentence for first degree murder. There were absolutely no mitigating circumstances to reduce the penalty from death to life imprisonment.

While the rule against inflammatory and abusive argument by a state's attorney is clear, each case must be considered upon its own merits and within the circumstances pertaining when the questionable statements are made, and, if there is ample basis in the record to support the remarks, a conviction will be affirmed.[2] Our review of the record convinces us that the remarks complained of were not sufficient to deprive Appellant of a

[2] *Collins* v. *State*, 180 So.2d 340 (Fla. 1965).

fair trial when the totality of the evidence is considered.[3]

Additionally, Appellant admits that his attorney voiced by a single objection to the prosecutor's closing arguments, that it was not directed to any of the allegedly inflammatory matter, and that his attorney waited until the fifth occasion to object at all. This Court has held that a prosecutor's challenged argument will be reviewed on appeal only when a timely objection is made.[4]

Accordingly, the judgments and sentences are affirmed.

It is so ordered.

ADKINS, C. J., ROBERTS and OVERTON, JJ., and FERRIS, Circuit Judge, concur.

SUNDBERG, J., dissents with an opinion, with which ENGLAND, J., concurs.

SUNDBERG, Justice (dissenting).

I dissent. Remarks made by the prosecutors during closing argument were so inflammatory and prejudicial that appellant should be afforded a new trial.

The fact that defense counsel characterized a person who would commit the offenses for which defendant was being tried as "an animal" did not excuse the prosecutor's subsequent, repeated personal descriptions of the defendant in this manner:

> ". . . But let me tell you something. As far as I am concerned, there should be another Defendant in this courtroom, one more, and that is the division of corrections, the prisons. As far as I am concerned, and as Mr. Maloney said as he identified this man, this person as an animal, this animal was on the public for one reason. Because the division of corrections turned him loose, lets him out, lets him out on the public. Can we expect him to stay in a prison when they go there? Can't we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking?
>
> "Mr. Darden said, oh, I don't know, no, I can't know, it's all right to drink, it's all right to drink alcoholic beverages, except the last. Remember one comment he made? Unless, well, as long as they don't find out. Find out? He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash.
>
> "This man admitted that he is a prisoner, that he had a gun in his possession. He doesn't work, he is in the pool halls, he is in the bars, he is in the lounges. He is a prisoner, supposed to have been. He is not a prisoner. No, I wish that person or persons responsible for him being on the public was in the doorway instead of Mr. Turman. I pray that the person responsible for it would have been in that doorway and any other person responsible for it, I wish that he had been the one shot in the mouth. I wish that he had been the one shot in the neck, instead of the boy.
>
> "Yes, there is another Defendant, but I regret that I know of no charges to place upon him, except the public condemnation of them, condemn them. Turn them loose to visit his family, to visit his family, that turns out his family is a girl friend in Tampa, his family is in, I think he called her his sponsor, his sponsor. . . ."

Perhaps the reference to a leash, although certainly inflammatory, was excusable as being evoked by two references in argument by appellant's counsel to the crimes being "the work of an animal"; however, I find no provocation by the defense for the balance of the prosecutor's above-quoted statements.

Another area of improper comment is exemplified by the following remarks:

> ". . . The second part of the trial I will request that you impose the death penalty. I will ask you

[3] *Sanders* v. *State*, 241 So.2d 430 (Fla. App. 1970); *Hamrick* v. *State*, 235 So.2d 360 (Fla. App. 1970), *cert. den.* 238 So.2d 421 (Fla.) *cert. den.* 400 U.S. 994, 91 S.Ct. 466, 27 L.Ed.2d 443.

[4] *State* v. *Jones*, 204 So.2d 515 (Fla. 1967).

to advise the Court to give him death. That's the only way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it. It's the only way that anybody can be sure of it now, because the people that turned him loose—this man served his time and if this man served his time as the Court has sentenced him, that's fine. If he's rehabilitated, fine. But let him go home on furloughs, weekend passes —not home, strike that, excuse me—go over with his girl friend for the weekend, go shoot pool for the weekend, go sell his guns, or gun, for the weekend, go consume drink in the bars over the weekend. . . ."

The precise implication in this and the foregoing excerpt is that the parole authorities and the Division of Corrections are being "soft on criminals" and the jury should remedy such situation by finding the appellant guilty on the first degree murder charge. This inserts a wholly immaterial issue into the proceedings which the jury could try rather than the defendant who was on trial; however, the defendant had to be the recipient of any verdict brought back by the jury.

Nor could the remarks of defense counsel be construed to serve as an invitation for the prosecutor's inflammatory expressions of regret that appellant had not been killed during his alleged commission of the crimes:

". . . Mr. Turman, not knowing anything happened, not knowing what was going on. I wish he had had a shotgun in his hand when he walked in the back door and blown his face off. I wish that I could see him sitting here with no face, blown away by a shotgun, but he didn't. He had no gun. He had no chance. He didn't give it to him. With a gun in the woman's back about to attempt his lust, his greed, the poor man opened the door and he shoots him between the eyes. Between the eyes, isn't that enough? Not for Darden it's not enough. There's more. . . ."

After describing further conduct surrounding the commission of the crimes the prosecutor expressed once again concerning the appellant, "I wish someone had walked in the back door and blown his head off at that point." Later,

". . . Okay. He's testified, Mr. Cunningham also testified that that cylinder turns to the left. As you fire the gun, pull the trigger, it turns to the left. I asked him to put the one marked in red—couldn't use a live one—under the hammer and pull the trigger. He did. When he was through pulling it five times, five times, because Darden shot Turman between the eyes; he clicked in the boy's face, that's number two; he fired in the boy's face is number three; he fired in the boy's neck, is number four; and he fired in the boy's back, number five, saving one. Didn't get a chance to use it. I wish he had used it on himself.

* * * *

". . . And Mr. Darden saved one. Again, I wish he had used it on himself. . . ."

In asserting that the appellant had attempted to change his appearance subsequent to the date of the crimes the prosecutor concluded with the remark, "The only thing he hasn't done that I know of is cut his throat."

At this juncture counsel for appellant objected:

". . . Your Honor, that's about the fifth time that he has commented he wished someone would shoot this man or that he would kill himself. . . ."

Upon which the trial court ruled:

". . . All right, gentlemen. Proceed with your argument. Objection will be overruled. Go ahead, sir. . ."

In *Stewart* v. *State*, 51 So.2d 494 (Fla. 1951), Mr. Justice Terrell cautioned prosecutors to refrain from inflammatory and abusive argument, directing trial judges to restrain and rebuke counsel from engaging in such tactics. The reason for inhibiting such conduct was concisely stated by him in the following terms:

> ". . . Under our system of jurisprudence, prosecuting officers are clothed with quasi judicial powers and it is consonant with the oath they take to conduct a fair and impartial trial. The trial of one charged with crime is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperment. . . ." (p.495)

The implication in the remarks by the prosecutor in that case was that if the defendant were not punished by the jury he would go on to commit a more serious and heinous crime. This can be equated with the argument of the prosecutor in the case at bar wherein he implies that unless the defendant is convicted on the first degree murder charge he will be set free "on the public".

Reference by the prosecution on repeated occasions to the defendant's conduct while on furlough directed the jury's attention to matters totally immaterial to the offenses charged, and it can be concluded that the only purpose of such references was to inflame and prejudice the jury in their deliberations upon the charges at issue. In *Gluck* v. *State*, 62 So.2d 71 (Fla.1952), the prosecutor, in the words of Justice Mathews, "hurled epithets at the accused so foul, vile, abusive and obscene as to be unquotable in this opinion". The trial judge refused to caution and admonish the state attorney that such conduct is highly irregular, as urged by the defense. Earlier in the rape prosecution, the prosecutor had referred to the accused's unemployment, family, religion, character, and had introduced detailed evidence respecting an alleged similar act, although the accused's identity and carnal knowledge of the prosecutrix were admitted. This court reversed the conviction and granted a new trial since the prosecution at issue was not "a fair and impartial trial". Rather than a fair commentary upon the eivdence or reasonable inferences to be drawn therefrom, the above-quoted remarks by the prosecution in the case at bar can only be characterized as vituperative personal attacks upon the appellant and as appeals to passion and prejudice.

As was stated by this Court in *Collins* v. *State*, 180 So.2d 340 (Fla.1965):

> ". . . The rule is clear against inflammatory and abusive argument—the problem is applying the rule to the particular facts at hand. The history of the legal profession is clear also in its love of florid arguments and dramatic perorations. The line between the inflammatory and the dramatic is not clear. . ."

Here that line has been crossed. Vigorous and diligent advocacy on the part of the state is not only commendable, but necessary to make our system of jurisprudence work. The strenuous advocacy by each of the parties to a criminal proceeding of the facts and evidence which best establish their respective positions provides the basis upon which the jury may synthesize all such facts and evidence to arrive at that most desired result in our system—the truth. However, appeals to passion and prejudice distort the system and must be condemned if our system is to function and endure.

Appellee asserts that timely objection to inflammatory argument must be made to preserve the point for appellate review. There has heretofore been quoted the objection made by the appellant's counsel to the remarks by the prosecution and the court's ruling thereon. I deem this sufficient to preserve the matter on appeal since it afforded the trial court the opportunity to at least attempt to cure the effects of the remarks. It is not clear at all, however, that it was even within the power of the trial court to disabuse the minds of the jurors of the cumulative effect of the patently inflammatory remarks of the prosecution even had it sustained the objections to the remarks and admonished the jury accordingly. The issue really is, did the appellant receive a fair trial in the atmosphere created by the prosecution's remarks. As pointed out by the court in *Wilson* v. *State*, 294 So.2d 327 (Fla.1974):

> "The State points out that in some instances there was an absence of objection in the present trial and in other instances an objection to the improper in-

ferences was sustained. Such absence will not suffice where the comments or repeated references are so prejudicial to the defendant that neither rebuke nor retraction may entirely destroy their influence in attaining a fair trial." (pp. 328-329)

See also *Pait* v. *State*, 112 So.2d 380 (Fla.1959); *Oglesby* v. *State*, 156 Fla. 481, 23 So.2d 558 (1945); and *Knight* v. *State*, 316 So.2d 576 (Fla.App. 1st 1975). I conclude that the remarks set out herein were such that would unduly create, arouse and inflame the sympathy, prejudice and passions of the jury so as to effectively deprive the appellant of a fair trial. *Barnes* v. *State*, 58 So.2d 157 (Fla.1952).

It is appropriate to comment upon another category of remarks made by the prosecution in final argument. In expressing their personal beliefs concerning the guilt and lack of veracity of the defendant the prosecutors argued:

". . . I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life. . . .

* * * *

". . . I don't know, he said on final argument I wouldn't lie, as God is my witness, as God is my witness, I wouldn't lie. Well, let me tell you something: If I am ever over in that chair over there, facing life or death, life imprisonment or death, I guarantee you I will lie until my teeth fall out.

"What does he have to lose to lie? Nothing. Nothing. The only person who took that stand, Mr. Maloney said no one took that stand and lied under oath. He was wrong. One did. Sitting over there with a yellow shirt on with the stripe down the front at this time. . . ."

These statements clearly violate the letter and spirit of Section 5.8(b), American Bar Association Standards

for Criminal Justice and D.R. 7-106(C)(4), Code of Professional Responsibility. Such argument has been condemned by this Court long before the adoption of the cited Standards and Code. As stated in *Tyson* v. *State*, 87 Fla. 392, 100 So.254 (1924):

"It is generally understood that the expression by counsel in argument before the jury of personal opinion of guilt is not only bad form, but highly improper, as counsel is not a witness, nor under oath to speak the truth, not called as an expert to give his opinion. Adams v. State, 54 Fla. 1, 45 So.494."

To reiterate the standard of conduct expected of a representative of the State in the prosecution of a criminal trial as heretofore enunciated by several of our district courts of appeals:

". . . It is the duty of a prosecuting attorney in a trial to refrain from making improper remarks or committing acts which would or might tend to affect the fairness and impartiality to which the accused is entitled. His duty is not to obtain convictions but seek justice, and he must exercise that responsibility with the circumspection and dignity the occasion calls for. Cases brought on behalf of the State of Florida should be conducted with a dignity worthy of the client. . . ."

Knight v. *State*, *supra*; *Cochran* v. *State*, 280 So. 2d 42 (Fla.App. 1st 1973); and *Kirk* v. *State*, 227 So.2d 40 (Fla.App. 4th 1969).

Yet the majority opinion suggests that this welter of highly prejudicial comment was fair, or if not exactly fair, then at least not so improper as to constitute reversible error "when the totality of the evidence is considered". In other words, any error underlying the conviction of the appellant must have been harmless. When one considers that Darden has been sentenced to die by the court which heard these arguments after recommendation of death by the jury to which they were made, it is evident that any assigned error should be

given very careful consideration before the harmless error doctrine is invoked. Obviously, resort to the doctrine in cases of capital punishment should be carefully limited.

In *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), a California state prosecutor had commented upon defendants' failure to testify and the trial judge had charged the jury that defendants' silence could be used as the basis for adverse inferences. On appeal, the Supreme Court of California held that, while these comments at trial had denied defendants their constitutional rights, such error did not constitute a "miscarriage of justice" and was therefore harmless. The United States Supreme Court reversed the conviction, holding that in order for the denial of a federal constitutional right to be held harmless in a state criminal case, the reviewing court must be satisfied *beyond a reasonable doubt* that the error did not contribute to a defendant's conviction. The court further held that the burden of proving lack of harm rests on the State. *Id.* at 24, 87 S.Ct. at 828, 17 L.Ed.2d at 710.

Surely there is a federal constitutional right to a fair and impartial trial in the courts of this State. U.S.Const. Amends. VI, XIV. Recognizing that no defendant is entitled to a *perfect* trial, nonetheless, I am not satisfied that Darden's fundamental right to a *fair* trial was unharmed by the prosecution's improper commentary and believe that under the *Chapman* test this conviction cannot stand. The Florida cases cited heretofore also lead me to this conclusion.

Accordingly, I would vacate the judgment and sentence of death and remand this cause for a new trial.

ENGLAND, J., concurs.

SUPREME COURT OF THE UNITED STATES

No. 76-5382

WILLIE JASPER DARDEN, PETITIONER

v.

FLORIDA

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of the State of Florida, Nos. 45056, 45108.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 1, 1976

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

No. 76-5382

WILLIE JASPER DARDEN,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

RESPONSE TO

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF FLORIDA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

No. 76-5382

WILLIE JASPER DARDEN,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

Respondent contends that the Petition for Writ of Certiorari here sought should not issue to review the judgment of the Supreme Court of Florida.

CITATIONS TO OPINIONS BELOW

Petitioner's citation to the opinion sought to be reviewed [Darden v. State, 329 So.2d 287 (Fla. 1976)] is accurate.

JURISDICTION

Respondent concedes the jurisdiction of this Court under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND QUESTIONS PRESENTED

Respondent will present its interpretation of both constitutional provisions and questions presented in the body of its arguments why the writ should not issue.

STATEMENT OF THE CASE

Respondent will recite appropriate facts and circumstances relative to the questions presented in the body of its argument. References to the record on appeal which was before the Florida Supreme Court will be indicated by the symbol "R" followed by the appropriate page number.

REASONS FOR NOT GRANTING THE WRIT

1. As his first ground, Petitioner complains of the closing arguments presented by the prosecutor. In order to best view these arguments it is necessary to be aware of the evidence upon which they were predicated.

On the evening of September 8, 1973, Mrs. Helen Turman was present in her furniture store located in Lakeland Florida (R-199). Some time between 5:00 P.M. and 6:00 P.M. the Petitioner entered the store expressing his desire to look at some furniture. With the exception of Mrs. Turman, he was the only one present in the building (R-203). Mrs. Turman proceeded to show him some couches and bedding. Petitioner apparently left momentarily telling Mrs. Turman that his wife would be back, presumably to inspect the same items he had been shown. Petitioner then returned and asked to see some ranges and stoves. Mrs. Turman complied with his request and in response to an inquiry of price Mrs. Turman started towards her adding machine (R-205). At that point, Petitioner grabbed Mrs. Turman's right arm and stuck a gun in her back and ordered her to do as he said. Petitioner then told the lady to fasten a glass sliding door and not to try anything funny. After this was accomplished he took Mrs. Turman to the cash register and told her to open it up (R-206). He then emptied the cash register drawer of all bills, the amount of which was not more than $15.00 (R-207). Petitioner then took Mrs. Turman to the back room of the store where some box springs and mattresses were stacked against the wall. At that moment Mrs. Turman's husband appeared at the back door, was warned by his wife not to come in and was immediately shot between the eyes. It was from this wound that Mr. Turman died (R-415).

-4- Petitioner then told Mrs. Turman not to move and

went over to her husband's body and pulled it half-way into the building (R-209). He returned to Mrs. Turman and told her to get down on the floor (R-209). As he unzipped his pants and undid his belt buckle, Petitioner told Mrs. Turman to take out her teeth and suck his penis (R-210). After this act was completed, Mrs. Turman and Petitioner were walking half-way back through the building when a neighbor and part-time employee, Phillip Arnold, shoved the back door open (R-211). Mrs. Turman screamed to Phillip Arnold to go back.

Phillip Arnold was squatting over Mr. Turman's body but did not know what Mrs. Turman meant by her warning (R-433). Phillip Arnold asked Petitioner to held move Mr. Turman out of the water. Petitioner replied "Sure, buddy, I'll help you." (R-435). Phillip Arnold looked down at the body and when he looked up Petitioner was standing over him with a gun in his face (R-435). Petitioner then pulled the trigger but the gun just "clicked" (R-436). Petitioner then pulled the trigger again and shot Phillip Arnold in the mouth. Phillip Arnold then started to run away from the store and Petitioner shot him in the neck (R-435). While still running away from the store, Phillip Arnold was shot yet a third time in the side (R-437).

Other evidence indicating Petitioner's guilt revealed that in an attempt to flee the scene, Petitioner wrecked his car, a vehicle matching the description of the one leaving the store. The probable murder weapon was found 39 feet from the scene of that wreck.[1]

---

[1]Expert testimony revealed that the weapon recovered at the scene of the car wreck was a .38 caliber revolver which had been modified to use .38 special cartridges. Because of this modification it was impossible to scientifically prove that the bullets recovered were fired from that gun. However, evidence showed that the cartridges, both live and spent, found in the gun were arranged and situated so that if someone had taken the gun and reconstructed the shots at the killing, the hammer to bullet relationship would be (and was) identical.

It was essentially the above evidence which was presented in the prosecution of Petitioner. It were these facts and circumstances which made the basis of the closing arguments; it was this evidence that the Florida Supreme Court considered as being "uniquely viscous crimes". Darden v. State, 329 So.2d 287 (Fla. 1976) at 290.

Respondent analyzes Petitioner's position with regards to this point as follows:

Although not specifically making references thereto, Petitioner is obviously aware of the rule of law that a federal appellate courts' review of state court proceedings is the narrow one of due process, rather than an exercise of the supervisory power over federal trial courts. Petitioner must be aware that this Court has recognized that a prosecutor in the heat of argument may understandably make improper or exaggerated statements, but that such statements will not necessarily constitute a violation of due process, Sawyer v. United States, 202 U.S. 150 (1906). It has been stated that each case must be decided on its own facts and circumstances. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). Petitioner also obviously knows that one of the factors to be considered in accessing the propriety of prosecutorial remarks is the relative strength of the prosecution's case. Berger v. United States, 295 U.S. 78 (1935).

Accordingly, it must be determined whether the remarks complained of, when viewed in light of all facts and circumstances, Donnelly v. DeChristoforo, 416 U.S. 637 (1974), deprived Petitioner of a fair trial and due process of law. It was this issue that the Supreme Court of Florida considered. An examination of that tribunal's decision reveals the acknowledgement that although the remarks constituted a violation of the Code of Professional Responsibility they did not deprive Petitioner of a fair trial, in

light of the totality of the evidence presented. The Florida Supreme Court noted that the remarks were in part responsive to defense counsel's remarks, that there was but a single objection to the closing arguments, and it was not directed to any of the allegedly inflamatory matters.

Considering these factors, as well as the overwhelming evidence of guilt, the Florida Supreme Court concluded that the closing arguments amounted to harmless error and that a deprivation of due process did not occur.

Respondent is, of course, aware that the overwhelming evidence of guilt militates against Petitioner's argument. Respondent is also aware that Petitioner claims constitutional infirmities in the manner in which he was identified. His effort is obvious; if he can show that his pre-trial and in-court identifications were unconstitutionally made then he necessarily can show that the evidence against him was weak thereby causing resolution of this particular question to weigh more in his favor. However, for the reasons discussed later in this response, Respondent submits that evidence of guilt was quite strong and that because of that factor the remarks of the prosecutors, if error, were harmless beyond a reasonable doubt. Harrington v. California, 395 U.S. 250 (1969); see also Milton v. Wainwright, 407 U.S. 371 (1972); Schneble v. Florida, 405 U.S. 427 (1972).

2. As his second reason for granting the Writ, Petitioner voices his extreme dissatisfaction in the manner by which he was identified before and during trial.

Initially, he refers us to Mrs. Turman's identification of him at the preliminary hearing. In an effort to create apparent confusion as to what standards are to apply, Petitioner does nothing more than track the reasoning of the Second Circuit Court of Appeals in Brathwaite v. Manson, 527 F.2d 363 (2 Cir. 1975), in an effort to show this Court that certiorari should be granted, if for no other reason than to clarify what Respondent deems the erroneous reasoning found in that decision. Respondent cares not how the Second Circuit Court of Appeals considers and interprets this Court's decisions. It is Respondent's position that the principles set forth in Neil v. Biggers, 409 U.S. 188 (1972) control.

As Petitioner correctly states, approximately four days after the murder he was given a preliminary hearing. At that hearing Mrs. Turman was called to the stand and she identified Petitioner as the man who killed her husband. Interestingly, Petitioner characterizes this preliminary hearing as a "tactic" of the State, one which was inherently suggestive. That is indeed noteworthy since this so-called "tactic" was a procedure utilized for the sole purpose of determining the existence of probable cause to bind the Petitioner over for trial. This "tactic" is a right which this Court has considered absolutely necessary before a defendant in Florida may be restrained. See Gerstein v. Pugh, 420 U.S. 103 (1974).

The purpose for having the preliminary hearing was to simply see if there was sufficient evidence to bind the Petitioner over for trial. Needless to say, if such evidence was lacking the man would have gone free. It was this proceeding which Petitioner would equate with a so-called

impermissibly suggestive show-up. This simply is absurd. The basis for Respondent's assertion of absurdity lies in the very obvious difference between the scope and function of a preliminary hearing and a one-to-one show-up. Had Mrs. Turman confronted Petitioner at a police station or jail or whatever and was asked the question "Is this the man who shot your husband?" then prehaps, arguably, Petitioner's position would be somewhat stronger. In that situation the confrontation would not be subject to fair and meaningful review at trial. In contrast to such a completely one-sided procedure the preliminary hearing identification was conducted in open court before a judge and with the presence of counsel. As such, an objective review may easily be had. That review shows that Mrs. Turman was asked "Is this the man that shot your husband?" she replied "Yes, sir" (R-50). After further testimony and cross-examination, the State moved "that the defendant be bound over to the Circuit Court on the charge of murder." Thereupon, the following transpired:

> "THE COURT: Mrs. Turman, I have only one question, because it's very important and I'll have to go back over it one more time, to be sure.
>
> "A. Yes, sir.
>
> "THE COURT: Are you sure about the identification of this man you see in front of you as being the same man that you've spoken about?
>
> "A. Even with his back to me while I sat back there, I reached over and touched my sister's hand and said, 'That's him.'
>
> "THE COURT: Alright." (R-53)

If we now apply the factors ennunciated in Neil, supra, we see that Mrs. Turman viewed the Petitioner under close, if not intimate, conditions for a period of time sufficient for him to have accomplished all of the events previously stated. Mrs. Turman's degree of attention, while perhaps not satisfactory to Petitioner, was nonetheless sufficient to cause her to be absolutely positive and certain

as to Petitioner's identity. One must temper the degree of certainty with the emotion of the moment. Although the lady did not pay that much attention to physical characteristics or clothing, she did remember customer's faces.

> "I did make that statement that I don't pay that much attention to how they are dressed or anything, but faces I do remember. I remember my customers." (R-232)

There can be no doubt but that Mrs. Turman was absolutely certain at the time she identified Petitioner at the preliminary hearing. As previously quoted, she could tell who he was while his back was to her and before she even took the stand at the preliminary hearing. The length of time between the crime and the confrontation was but a few days.

With regards to the pre-trial identification by Phillip Arnold, the record reveals that while in the hospital recovering from his wounds Phillip Arnold was shown six photographs and was told to study them and be certain of his identification before he decided (R-475). Two of these photographs, Petitioner's included, had names on them. Mr. Arnold selected the Petitioner's photograph. Although at trial certain discrepancies were noted in Mr. Arnold's testimony as to time and other conditions the trial court allowed his in-court identification based on the following colloquy:

> "Q: All right, Mr. Arnold, I want you to look at this man and tell me whether or not you can identify him from the time you saw him when he blasted you in the face? Can you, think back to September 8th, 1973, forget everything else, forget the hospital, forget everything, September 8th and right now.
>
> "A: Yes, sir, that's him.
>
> "Q: Do you have any doubt whatsoever in your mind?
>
> "A: No, sir, none.

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"Q: Did the photographs--Are you remembering the photographs?

"A: No, sir.

"Q: What are you remembering?

"A: The day I was shot.

"Q: Are the photographs helping you in any way?

"A: No, sir.

"Q: Whatsoever to identify him?

"A: No, sir.

"Q: None whatsoever in your mind?

"A: None.

"Q: Has any newspaper articles--

"A: No, sir.

"Q: --helping you identify this defendant?

"A: No, sir.

"Q: Why are you identifying him?

"A: Because that's the man that shot me." (R-466-467)

* * *

and before the jury:

* * *

"Q: Phillip, I want you to think back to the afternoon or the evening of September the 8th, 1973. I want you to remember the person that had the gun in your face. I want you to remember the person who pulled the trigger, and remember the person that shot you in the face.

"A: (Nods head.)

"Q: And in the back or side.

"A: (Nods head.)

"Q: I want you to look in the courtroom and see if you see that man today.

"A: Yes, sir, the Defendant.

"Q: What color shirt does he have on today?

"A: Blue.

-//-

"Q: That's the man at the end of the table?

"A: Yes, sir.

"Q: Phillip, is there any doubt whatsoever in your mind that the man you pointed to is the Defendant?

"A: No, sir, none.

"Q: None at all.

"MR. MCDANIEL: Let the record show that the witness identified the Defendant."
(R-492)

Accordingly, the issue descended to one of credibility and as such was proper for the jury to consider.

In rejecting Petitioner's claim on appeal the Florida Supreme Court, although not specifically so stating, probably relied on established Florida law, e.g. Tafero v. State, 223 So.2d 564 (Fla.App.3d 1969), and its own decision in Chaney v. State, 267 So.2d 65 (Fla. 1972). In both cases the impact of this Court's decisions was discussed, especially Simmons v. United States, 390 U.S. 377 (1968), and Kirby v. Illinois, 406 U.S. 682 (1972). A quick reading of Chaney, supra, conclusively shows that the Florida Supreme Court is aware of this Court's guidelines and further that these guidelines were considered and applied to Petitioner's claim. Respondent submits that based on the totality of the circumstances both with regards to Mrs. Turman and Phillip Arnold, the identification of Petitioner did not violate constitutional safeguards.

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3. As his final point, Petitioner disdains the fact that five prospective jurors were excused for cause on the basis of their opposition to capital punishment. He specifies two veniremen who he claims were less than conclusive in voicing their objections to the death penalty.

The record shows that the five prospective jurors who were excused were done so on the basis of the following exchanges:

> "All right, Mrs. Macy, do you hold such conscientious moral or religious principles in opposition to the death penalty you would be unwilling under any circumstances to recommend the death sentence?
>
> "MRS. MACY: No, sir.
>
> "THE COURT: Do you, Mr. Blankenship?
>
> "MR. BLANKENSHIP: No, sir.
>
> "THE COURT: Mr. Pelellat?
>
> "MR. PELELLAT: No, sir.
>
> "THE COURT: Mrs. Spike.
>
> "MRS. SPIKE: No, sir.
>
> "MR. VARNEY: Yes sir.
>
> "THE COURT: You feel then, sir, that even though and I am not saying it will it would be purely speculative, in the event that the evidence should be such that under the law that should be the legal recommendation you would be unwilling to return such a recommendation because of your conscientious beliefs?
>
> "MR. VARNEY: I believe I would." (Emphasis added) (R-44)

* * *

> "THE COURT: Mrs. Hann, do you hold such strong conscientious moral or religious beliefs that you would be unwilling under any event to return a death sentence?
>
> "MRS. HANN: No, sir.
>
> "THE COURT: Mr. Waller?
>
> "MR. WALLER: No, sir.
>
> "THE COURT: Mr. DeMilt?

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> "MR. DeMILT: No, sir.
>
> "THE COURT: Mr. Dorminy?
>
> "MR. DORMINY: No, sir.
>
> "THE COURT: Mrs. Keck?
>
> "MRS. KECK: No, sir.
>
> "THE COURT: Mr. Roberts?
>
> "MR. ROBERTS: No, sir.
>
> "THE COURT: Mr. Mays?
>
> "MR. MAYS: Yes, I could not recommend it.
>
> "THE COURT: All right.
>
> "You will be excused, Mr. Mays. Mr. Maloney, I assume you wish the same objection to apply to him.
>
> "MR. MALONEY: Yes, Your Honor.
>
> "THE COURT: So recorded." (Emphasis added) (R-45-46)

* * *

> "THE COURT: All right, sir, have a seat.
>
> "Ms. Carn, the fact your husband for a while was a police officer and the fact that we have here listed as witnesses many police officers and deputy sheriffs conceivably could raise a little bit of a problem. Do you think that because of your husband's previous occupation that you might be a little inclined to give what the officers say more weight than you would any other witness you didn't know?
>
> "MS. CARN: I don't think that would; but I do not believe in capital punishment.
>
> "THE COURT: The question isn't, ma'am, whether you believe in capital punishment or not; the question is whether or not you have such a strong disbelief in it as to make it unable for you to vote to return a recommendation of the death penalty regardless of what the evidence might be.
>
> "MS. CARN: That's right.
>
> "THE COURT: All right, ma'am. Then we will excuse you then rightnow [sic]. I appreciate your candor." (Emphasis added) (R-106-107)

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BY THE COURT: "I have asked the others and I will ask each of the four of you whether you have such strong religious, conscientious or moral principles against the imposition of the death penalty that you would be unwilling to vote to return a recommended sentence of the death penalty regardless of what the evidence or the facts might be?

"Would you Ms. Pigeon?

"MS. PIGEON: Yes, sir.

"THE COURT: Mr. Wall?

"MR. WALL: No, sir.

"THE COURT: How about you, Ms. Maher?

"MS. MAHER: Yes, I do have such convictions. I am a Seventh Day Adventist.

"THE COURT: And no matter what the evidence showed you don't think you would vote for it?

"MS. Maher: I couldn't, sir.

"THE COURT: Very well, over the objections of the defendant she will be excused. (Emphasis added) (R-109-110)

* * *

"THE COURT: Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?

"MR. MURPHY: Yes, I have.

"THE COURT: All right, sir, you will be excused then." (Emphasis added) (R-165)

Clearly from an examination of the above, it is seen that each of the prospective jurors could not, and would not, take any part of the proceedings if the possibility of death was the penalty regardless of what the evidence showed. While it is true that Mr. Murphy "was excluded on the basis of an even more perfunctory exchange", Petitioner forgets that Mr. Murphy, as well as all veniremen, were present in the courtroom during the examination of all prospective jurors. Mr. Murphy heard questions asked of other veniremen, he knew the purpose of the questions relating to capital

punishment and he had ample time to make up his mind how he felt. Although the record shows that Mr. Murphy was excluded by virtue of one question, it must be remembered that his answer was given in response to not only that question but all others similar to it.

Simply put, the five prospective jurors were excused due to their opposition to capital punishment. This is conceded. The reason for their exclusion is relatively easy to understand.

First, Respondent contends that Witherspoon v. Illinois, 391 U.S. 510 (1968), is of no significant applicability to the situation at bar. The reason for this is clear; under Florida law, §921.141(3), F.S., the jury is not responsible for the penalty imposed in a capital case. The burden of assessing what penalty a given defendant should suffer is visited solely upon the trial judge. In the clear language of the statute, the function performed by the jury during the sentencing phase of a capital trial is advisory only. Proffitt v. Florida, ___U.S.___, 49 L.Ed. 2d 913, 96 S.Ct. ___ (1976).

Accordingly, it is wondered what difference it makes that the jury which convicted the Petitioner contained no members opposed to capital punishment. If they play no part in the ultimate decision of life or death, how can it be said that the State of Florida "entrust[ed] the determination of whether a man should live or die to a tribunal organized to return a verdict of death." Witherspoon at 521.

The law of this State is that if a man commits a capital crime he may, subject to being convicted, face two possible penalties--death or life imprisonment. What we hope to accomplish in excluding prospective jurors opposed to capital punishment is a jury that is at least "willing

to consider all of the penalties provided by state law . . ." Witherspoon at 522, note 21. We obviously, through such exclusion, do not necessarily impanel a strictly "pro-death" jury. We simply have one which is not irrevocably committed to vote against the death penalty even if the facts support such a measure. The people of the State, in enacting our law, are just as much entitled to such a composition of a capital jury as is a defendant facing a Witherspoon situation where the jury actually determines the penalty.

If Florida did not have the law it does concerning the imposition of the death penalty, then perhaps Petitioner could have at least an arguable contention. Assuming, however, arguendo that a Witherspoon jury system existed in this State, then the exclusions of the five prospective jurors sub judice still would not have violated the teachings of Witherspoon. As Petitioner correctly states in his brief, exclusion is legally permissible when veniremen make it unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. He complains however that no inquiry was made concerning the personal beliefs of the prospective jurors vis-a-vis the determination of guilt. Respondent notes that the above requirements are stated in the disjunctive; only one need be present.

Consequently, even if Witherspoon controls, its requirements were met. Its requirements, however, need not be considered since the jury sub judice played but an advisory role in the ultimate decision to impose death as the penalty for Petitioner's crimes.

Turning now to Petitioner's claim that by excluding a "class" of prospective jurors (those opposed to capital punishment) he was not tried by a representative cross section of the community.

Perhaps it is at best arguable that those opposed to capital punishment could be considered a "class" of society; it probably could likewise be considered that people with blue eyes are also a "class". In short, there are probably as many distinct classes of society as there are members of society.

Respondent submits that if those people who were excluded constituted a class of any kind then it was one which should be more properly termed "not willing to follow the law as instructed." §921.141(2), F.S., specifically requires that:

> "After hearing all the evidence the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);
>
> (b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life *[imprisonment] or death." (Emphasis added)

Instructions to that effect were given prior to voir dire. Query: if the law requires that the jury deliberate on the issue of penalty, included in which is death, and we know that those opposed to capital punishment will not consider one of the options required by law, then these people will not follow the law. These people are no different than those who state that they will not follow any of the instructions given them by the court. They are automatically defective as far as any notion of the purpose of the trier of fact.

If these people constitute a class it is as that described above. But it is not of such nature as those discussed in the cases cited by Petitioner. Examination of those cases reveal that the classes, whether grouped by race, age, or sex, were automatically excluded from even being in a venire. They didn't get the chance to even be put on a list of any sort. Obviously therefore whatever the makeup of the juries in those cases, it necessarily lacked representatives of the class excluded well prior to any voir dire.

Such is not the case sub judice nor is it the case in any other capital trial. The group of people posed to capital punishment are not excluded within the meaning of the cases Petitioner offers as authority; they are excused during examination since they refuse (or will refuse) to follow the law as instructed.

CONCLUSION

It is respectfully submitted, based on the above and foregoing, that none of Petitioner's reasons for granting the Writ are based upon situations which rise to a federal constitutional level. If any of the proceedings about which he complains were error, they were harmless beyond a reasonable doubt. Accordingly, having not shown sufficient cause to invoke this Court's discretionary review, Petitioner's Petition for Writ of Certiorari to the Florida Supreme Court should be denied.

Respectfully submitted,

Robert L. Shevin
Attorney General

Richard W. Prospect
Assistant Attorney General

COUNSEL FOR RESPONDENT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Petition for Writ of Certiorari to the Supreme Court of Florida has been forwarded to Geoffrey M. Kalmus, Esquire, Nickerson, Kramer, Lowenstein, Nessen, Kamin & Soll, 919 Third Avenue, New York, New York 10022 and Harold H. Moore, Esquire, 2058 Main Street, Sarasota, Florida 33577, Attorneys for Petitioner, this _____ day of October, 1976.

Of Counsel

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-5382

WILLIE JASPER DARDEN,

Petitioner,

- v -

STATE OF FLORIDA,

Respondent.

REPLY TO THE STATE'S RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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REPLY TO THE STATE'S REPONSE TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

We briefly reply to the response of the Attorney General of Florida to the petition for certiorari.

I

In point I of the petition we urged that the Court grant certiorari to consider whether the prosecution's closing arguments were so grossly improper and inflammatory that they deprived petitioner of his Fourteenth Amendment right to a fair trial. See Donnelly v. DeChristoforo, 416 U.S. 637

(1974). The state's response only serves to confirm the sour ness of the position that we advanced. Indeed, we submit tha on the basis of the petition and the response, a summary reve sal of the judgment below would be warranted.

The state's response acknowledges that the conduct of the prosecutors in summation to the jury "constituted a violation the Code of Professional Responsibility" (response p. 6).* It, nonetheless, seeks to sustain the judgment convicting petitione and sentencing him to death by reliance upon a series of plainl specious claims, the principal one of which is that the evidenc of petitioner's guilt was "overwhelming" and that, therefore, the prosecutors' misconduct was "harmless beyond a reasonable doubt" (response p. 7).

The state's assertion that the evidence against petitioner was "overwhelming" is, put most bluntly, nonsense; hence, its reliance on the harmless-constitutional-error doctrine is wholly misplaced.

We will not dwell upon the evidence here; it was set out fairly and with precision in our petition. Indeed, the state's recitation of the facts does not diverge sharply from our own.**

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*References are to the pages of the response of the Attorney General of Florida; references preceded by the letter "R." are to the pages of the record on appeal to the Florida Supreme Court.

**We assume that the Attorney General's statement that the assailant committed a sexual assault on Mrs. Turman in the course of the crime was an inadvertent error (response p. 5). Mrs. Turman's own testimony was crystal-clear that the assault, though threatened, never, in fact, occurred (R. 210-11).

Suffice it to say that, unlike the harmless error cases cited by the state in its response (p. 7), here there was no confession by the petitioner, no incriminating testimony from an accomplice, no ballistic evidence linking the gun introduced in evidence to the murder, no finger prints, and no other tangible evidence connecting petitioner to the crime.*

Rather, as we described in full in the petition, the case against Darden turned in overwhelming measure upon the identification testimony of two witnesses to the crime -- identification testimony the accuracy of which was subject to substantial doubt. Thus, when the case went to the jury, its members were obliged to decide whether to credit the questionable identifications by the prosecution's witnesses or to accept petitioner's plausible explanation of his movements on the evening of the crime. In this circumstance, a summation by the prosecution confined to the evidence and free of inflammatory digressions was crucial; the contention of the state that the content of the summation that actually occurred, however blatantly improper, could have made no real difference in the jury's deliberations is frivolous.

Indeed, we submit that prosecutor McDaniel's plainly pre-

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*All three of the cases cited by the state, Milton v. Wainwright, 407 U.S. 371 (1972); Schneble v. Florida, 405 U.S. 427 (1972); and Harrington v. California, 395 U.S. 250 (1969), involved properly admitted confessions by the appellants, and, as the Court phrased it in Schneble, the confessions were "corroborated by other objective evidence and ... not contgradicted by any other evidence."

meditated and repeated focus in his closing argument upon matters wholly irrelevant to the evidence itself persuasively demonstrates his own recognition of the thinness of his case. Surely, no prosecutor would engage in so needlessly studied a course of improper argument, if he supposed that the evidence favoring conviction was overwhelming.

In view of the actual frailty of the prosecution's case against petitioner the language of the Court in Chapman v. California, 386 U.S. 18, 22 (1967), is particularly apt:

> "In fashioning a harmless-constitutional-error rule, we must recognize that harmless-error rules can work very unfair and mischievious results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the quesiton of guilt or innocence is a close one."

Similarly, the Court's reasoning in Chapman, explaining why repeated prosecutorial comment upon a defendant's failure to testify was not harmless, applies as well to the prosecution's summation in our case:

> "Under these circumstances, it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions. Such machine-gun repetition of a denial of constitutional rights, designed and calculated to make petitioners' version of the evidence worthless, can no more be considered harmless than the introduciton against a defendant of a coerced confession." 386 U.S. at 26.

In sum, the state's claim of harmless constitutional error here cannot be taken seriously.

Only a few paragraphs need be added to dispose of the

state's other efforts to prop up the judgment of the Florida Supreme Court against our arguments concerning the prosecutors' summation. First, the state seems to suggest that the scope of this Court's review is somehow restricted by the conclusion of the court below that the prosecutors' conceded misconduct was harmless (response pp. 6-7). This Court has repeatedly emphasized, however, its duty to decide for itself whether a trial record evidences a deprivation of constitutionally protected rights. E.g., Blackburn v. Alabama, 361 U.S. 199, 205 n. 5 (1960). Surely, this obligation is at its most urgent when life itself is at stake.

Second, the state seeks to excuse the prosecution's conduct by urging that McDaniel's summation was "in part responsive to defense counsel's remarks" (response p. 7) and that his improper arguments should be overlooked because they were made "in the heat of argument" -- almost involuntarily, as it were (response p. 6). Understandably, respondent offers no citation to the trial record to support these assertions, and none would, in fact, be possible.

The supposed defense provocation -- which, in any event, related to only one of the less offensive of the prosecutor's many improper remarks -- concerned McDaniel's characterization of petitioner as "an animal" who belonged "at the other end of [a] ... leash" (R. 750). The alleged provocation -- quoted by the Supreme Court of Florida in its opinion, Darden v. State, 329 So. 2d 287, 289 (Fla. 1976) -- was nothing more than a prior comment by one of the petitioner's attorneys that anyone who would commit crimes of the sort charged by the state would be a "vicious animal" (R. 717). Defense counsel, of course, did not apply this characterization to petitioner.

Finally, the suggestion that prosecutor McDaniel's numerous improper statements were mere slips of the tongue "in the heat of argument" is belied simply by a reading of his entire summation. Surely, the constant repetition of so many inflammatory and irrelevant themes cannot have been accidental. Rather, his conduct is explicable on no other premise than as a conscious choice by the prosecutor to draw the jury's attention away from the testimony upon which it was supposed to found its verdict.

In sum, none of the flimsy arguments the state advances to excuse the prosecution's repeated violations of the Code of Professional Responsibility and to sustain the judgment below is deserving even of detailed scrutiny by the Court. We submit that a summary reversal is in order. Failing that, certiorari should be granted to consider whether the prosecution's misconduct deprived petitioner of a fair trial.

II

We argued in our petition that certiorari should also be granted to consider whether the admission in evidence on the state's direct case of a wantonly and needlessly suggestive pretrial identification by Mrs. Turman or of two at-trial identifications of petitioner subsequent to impermissively suggestive pretrial idenficiations deprived Darden of due process of law (petition pp. 27-39).

As the state implicitly acknowledges (response p. 8), the first of these two issues is substantially that already before the Court in Brathwaite v. Manson, 527 F. 2d 363 (2d

Cir. 1975), cert. granted, 48 L. Ed. 2d 202 (May 3, 1976, No. 75-871). We asked that the Court grant certiorari and consider the consitutionality of the admission in evidence of the pretrial identification of petitioner along with the Brathwaite case, and the state's response suggests no reason why this should not be done.

As we described in the petiton, the Brathwaite issue arose here when Mrs. Turman was permitted to testify at trial concerning her identification of petitioner at a preliminary hearing four days after the murder. Petitioner was the only black person in the courtroom at the time of that pretrial confrontation and, as we showed in the petition, the prosecution led Mrs. Turman into identifying petitoner as her husband's murderer.

In response, the state wholly misses the thrust of our argument, contending that the original identification of petitioner by Mrs. Turman and the admission in evidence of testimony as to its occurrence did not violate Darden's rights because the identification was made in the presence of a judge and defense counsel "for the sole purpose of determining the existence of probable cause to bind the Petitioner over for trial" (response p. 8).

Both the purpose for which the confrontation was arranged and the presence of counsel and a judge during it are irrelevant to the claim we advance. What is crucial is the manner in which the pretrial identification was conducted and the use to which it was put at petitioner's trial.

If the state wished to utilize at trial testimony of a nearly contemporaneous identification of petitioner by the witnesses to the crime, it had ample opportunity to conduct a proper line-up prior to the preliminary hearing; it suggests no reason why this could not have been done. Moreover, having failed to conduct such a line-up, the prosecution could, at the least, have refrained from eliciting on its direct case testimony concerning the identification of petitioner at the preliminary hearing. Certainly, it is a non sequitur to contend that, because a preliminary hearing is required by Florida law, an identification procedure violative of a defendant's rights may be employed at such a hearing and that the wrong may then be compounded with impunity by the use at trial of testimony as to the earlier identification.

Finally, the state's response to point II of the petition -- apparently directed to the issue presented by Simmons v. United States, 390 U.S. 377 (1968) -- emphasizes Mrs. Turman's certainty concerning her identification of petitioner at the preliminary hearing. As if to drive home its point, the state quotes (response p. 9) the following exchange from the preliminary hearing:

> "The Court: Are you sure about the identification of this man you see in front of you as being the same man that you've spoken about?
>
> A: Even with his back to me while I sat back there, I reached over and touched my sister's hand and said, "That's him'" (R. 53).

It seems evident to us that Mrs. Turman's claim that she was able to identify her husband's assailant immediately

upon seeing the back of the head of the only black man present demonstrates much more effectively thatn anything else we might say just how suggestive the show-up at the preliminary hearing was.

III

In the final point of the petition we urged that the Court grant review to decide whether the exclusion for cause of five veniremen because of their expressed attitudes toward the death penalty was inconsistent with the Court's decision in Witherspoon v. Illinois, 391 U.S. 510 (1968) (petition pp. 40-48).

Apparently, the state concedes that the trial court's exclusion of venireman Murphy was contrary to Witherspoon, if the court's perfunctory interrogation of Mr. Murphy is considered alone (response p. 15). Respondent argues, however, that Mr. Murphy's erxclusion and the trial court's interpretation of his ambiguous responses to its questions were justified because this venireman was present in the courtroom when all of the other prospective jurors were examined.

This contention is inconsistent with the Witherspoon holding that the existence of disqualifying factors must be "unmistakably clear." 391 U.S. at 522 n. 21. Indeed, the Court apparently rejected an argument like that advanced here five years ago. Washington v. Adams, 76 Wash. 2d 650, 458 P. 2d 558, 575 (1969), rev'd per curiam, 403 U.S. 947 (1971).

The state also suggests that Witherspoon is irrelevant to the present case, because Florida law renders the jury's role in sentencing merely advisory. The Court's opinion in Witherspoon, however, expressly made its holding applicable to pro-

cedures under which juries "impose or recommend" the death penalty. 391 U.S. at 522. The soundness of this application is plain, for the Florida Supreme Court has emphasized that the jury's recommendation may be a "crucial factor in determining whether or not the death penalty should be imposed." LeMadline v. Florida, 303 So. 2d 17, 20 (Fla. 1974).

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STATE OF FLORIDA,

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BRIEF FOR PETITIONER

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CITATION TO THE OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of Florida are reported at 329 So.2d 287 (Fla. 1976), and are set out in the appendix (A. 158-72).[1]

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[1] References preceded by the letter "A" are to pages of the printed appendix; those preceded by the letter "R" are to pages of the typewritten record on appeal to the Supreme Court of Florida.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on February 18, 1976; the court denied rehearing on April 19, 1976. On July 8, 1976, Mr. Justice Powell, who had earlier issued a stay of execution of the death sentence imposed upon petitioner, granted petitioner's request for an extension of time to file a petition for a writ of certiorari to September 16, 1976. The petition was filed on September 15, 1976; certiorari and leave to proceed *in forma pauperis* were granted on November 1, 1976.

Petitioner asserted below and asserts here the deprivation of rights secured to him by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Was petitioner's right to a fair trial denied to him by the prosecution's flagrantly irrelevant and inflammatory summation to the jury, when the misconduct was (i) repeated and persistent, (ii) intentional, (iii) unremedied by a curative instruction from the court, notwithstanding defense counsel's objection, (iv) unprovoked by defense counsel, and (v) of probable importance in persuading the jury to convict and to recommend imposition of a death sentence upon evidence of guilt that was far from overwhelming?

2. Was petitioner deprived of a federal constitutional right by testimony on the state's direct case of a one-to-one identification that occurred at a preliminary hearing, when this earlier identification had been both wantonly and needlessly suggestive?

3. Was petitioner deprived of rights accorded him by the Constitution by reason of two in-court identifications, both of which may have been the product of impermissibly and needlessly suggestive pretrial identifications?

4. Were petitioner's constitutional rights infringed by the exclusion for cause of veniremen who acknowledged that to vote to recommend that petitioner be sentenced to death would violate their moral and religious principles?

STATEMENT OF THE CASE

A. The crime and the evidence at trial

Early in the evening of September 8, 1973, Carl's Furniture Store in Lakeland, Florida was held up, one of its owners, Carl Turman, was shot and killed as he entered through a back door, and Phillip Arnold, a sixteen-year-old boy who lived nearby, was shot and wounded as he sought to give aid to Mr. Turman (A. 24-30, 65-70). At about the time of these events, petitioner, on weekend furlough from a Florida prison, lost control of his girlfriend's car as he drove toward her house in Tampa and struck a telephone pole adjacent to the highway (R. 331-32, 574-77, 600). The accident took place a little over three miles from the furniture store (R. 508, 539).

A few hours thereafter, petitioner was arrested at the home of his girlfriend for leaving the scene of an accident. Later the same night, he was charged with the murder of Mr. Turman, the attempted murder of Mr. Arnold, and the robbery that accompanied these shootings (R. 586). Following a change of venue to rural Citrus County (R. 138), Mr. Darden was tried for

first degree murder and the other, lesser crimes in mid-January 1974.

The principal evidence proffered by the state was two-fold: the identification of petitioner by Mrs. Turman and Mr. Arnold (A. 36-37, 96-97), both of whom had furnished descriptions of the assailant immediately after the crime that differed markedly from petitioner's appearance, and testimony from a deputy sheriff who, on the day following the crime, had found a .38 caliber pistol in a ditch more than thirty feet from the highway and about an equal distance from the place of the automobile accident the evening before (R. 503-04, 511). The pistol was shown at trial to be of the same caliber as the murder weapon and to have had four bullets fired from it, but was not connected to the crime by ballistic or other evidence of a more definitive character (R. 357-58, 514, 517-22).

Petitioner testified at length on his own behalf (R. 571-659) and told how his automobile had skidded from the highway in wet weather as he hastened back to Tampa from Lakeland to meet his girlfriend and attend a wedding later on in the evening (R. 574-76). Both he and witnesses called by the state explained that, with the aid of a passing motorist, he had sought unsuccessfully but with seeming equanimity to locate a wrecker to take the disabled auto in tow and, having failed in this effort, had obtained a ride to Tampa (R. 577-579, 330-31, 334-35, 340-41). Petitioner denied that he had been at the furniture store or had had anything to do with the crimes with which he was charged (R. 592-93, 598-99).

Mr. Darden's recitation of the events of the evening of September 8 was neither implausible in itself nor, apart from the identification testimony of Mrs. Turman and Mr. Arnold, was it in direct conflict with the state's evidence.

In sum, at the close of the evidence, the prosecution's case for conviction was a doubtful one and depended, in overwhelming measure, upon the jury's acceptance of the identification testimony of the state's two principal witnesses. With this uncertainty, the summations to the jury took on particular importance.

B. The summations and the conviction

Seemingly recognizing that a summation confined to marshalling the evidence and considering the inferences to be drawn from it might fail to elicit a conviction, Mr. McDaniel, the second of the two prosecutors to address the jury, devoted the bulk of his closing argument to matters wholly irrelevant to the question of petitioner's guilt or innocence. Even upon a cold written record, the text of the summation itself virtually compels the conclusion that the prosecutor's chosen objective was to distract the jurors from the proper performance of their task and to impel them to return a verdict based upon passion and animosity. If ever a prosecutorial summation may so overstep the bounds of legitimate argument as to deprive a defendant of a fair trial, McDaniel's summation here did so.

Within less than thirty-five transcript pages, the prosecutor time and again focused the jurors' attention upon the Florida Division of Corrections as that "unknown defendant" who, through the weekend furlough granted to petitioner, had turned him loose "on the public" (A. 121-22, 128-29); invited a conviction for first degree murder and the recommendation of a death sentence as "the only way that I know that he [the defendant] is not going to get out on the public" (A. 123); and expressed his "wish that the

Division of Corrections was sitting in the chair [as a co-defendant] with him [Darden]" (A. 137).

Another theme repeatedly voiced was McDaniel's own hatred of petitioner. Time after time he sought to infect the jurors with his own animosity, wishing out loud that Darden had "blown his [own] face off," "cut his [own] throat," "blown his [own] head off," or "been killed in the [auto] accident." (A. 125-26, 133, 136).

Repeatedly also, the prosecutor put his own opinions as to petitioner's credibility in issue, explaining to the jury that, were he in Darden's position, he would also "lie until my teeth fall out" (A. 124). In like vein both McDaniel and his co-prosecutor emphasized to the jury their personal beliefs that petitioner was guilty. "I don't believe anything he [Darden] says" (A. 131), McDaniel announced, and "I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer," prosecutor White told the jurors. "I will be convinced of that the rest of my life," he concluded (A. 120).

Beyond any doubt, these and numerous other flagrantly irrelevant and inflammatory remarks by the prosecution were the product not of mischance but of calculation, were unprovoked by any conduct of the defendant or his counsel, and were permitted by the trial court to proceed unrestrained, despite objection.[2]

Following the summations, the jury brought in a verdict of guilty on all counts and, in the second half of the bifurcated trial, recommended that petitioner be sentenced to death, a recommendation embraced by the trial judge.

On appeal, the Supreme Court of Florida affirmed petitioner's conviction and sentence by a five-to-two

[2]The text of the prosecutors' summations is set out at pages 116-37 of the appendix.

vote. *Darden v. State*, 329 So.2d 287 (Fla. 1976). The majority, though acknowledging that the prosecution's remarks and summation "under ordinary circumstances would constitute a violation of the Code of Professional Responsibility" and "would have possibly been reversible error," concluded that the heinousness of the crimes transformed the prosecutors' tactics into "fair comment." 329 So.2d at 290 (A. 162-63).

The dissenting justices, on the other hand, urged that, by reason of the prosecution's misconduct, petitioner was entitled to a new trial, both as a matter of state law and under the command of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. 329 So.2d at 291-95 (A. 164-72).

C. The identification testimony

As we have said, the identifications of petitioner by Mrs. Turman and Mr. Arnold were crucial to the prosecution's case. We describe here how Mrs. Turman was permitted to testify on the state's direct case about her initial one-to-one identification of the defendant at a preliminary hearing. We also show how the in-court identifications of both witnesses were infected by needlessly and impermissibly suggestive pretrial identifications.

i. Mrs. Turman's identification of petitioner

According to Mrs. Turman, she was alone in the furniture store just prior to closing time on the evening of the crime (A. 24). A heavy-set black man had come in, ostensibly to look for used furniture for some

apartments (A. 24-25). After examining a variety of furniture and appliances, the customer appeared to leave the store, only to return in a moment's time, pistol in hand, demanding the money in the cash register (A. 26-27, 48-49). Mrs. Turman testified that, as she and the robber moved toward the back of the store, her husband entered through the rear door and was shot down in his tracks as she cried out a warning to him (A. 27-18).

A threatened sexual assault followed, but almost immediately Phillip Arnold, who lived just a few houses away from the furniture store, pushed open the back door, saw the prostrate Mr. Turman and squatted down to give aid to him (A. 28-31, 65-68). Within a few seconds, however, the assailant moved toward Mr. Arnold, shot him in the mouth as he looked up from his squatting position, and shot him again in the neck as he turned to flee (A. 30-31, 68-70). A third bullet struck Mr. Arnold from the rear as he ran toward his home and the gunman hastened out of the store behind him (A. 69-70).

All told, according to Mrs. Turman, she was in the presence of the robber for perhaps ten minutes, while Mr. Arnold testified that he saw the gunman for no more than twenty or twenty-five seconds, during a portion of which his attention was focused upon the body of Mr. Turman (A. 40, 48, 98-100).

Within an hour or two of the crime, Mrs. Turman described the attacker to a deputy sheriff as a heavy-set, clean-shaven black man, approximately 200 pounds, with a fat face and of her own height – five foot, six inches – wearing a dark-colored pullover sports shirt (Suppression hearing, 57; A. 37-38, 44-45). When asked by the deputy whether she would be able to identify the criminal upon sight, she replied, "I would try, I would try; I might – I don't know" (A. 45-46).

In contrast to this description, the trial testimony showed that petitioner was five feet, ten or eleven inches tall and weighed approximately 170 to 175 pounds (R. 596). Moreover, one of the state's witnesses, a motorist who had stopped at the scene of the auto accident that occurred, according to the prosecution's theory, when petitioner was fleeing the scene of the crime, testified that petitioner was wearing a white or greyish shirt that buttoned down the front and that he had a moustache (R. 311, 313, 318-20).

In view of these contradictions, the gratuitously unfair circumstances of Mrs. Turman's pretrial identification of petitioner are particularly significant.

Although, as we have noted, petitioner was arrested and charged with Mr. Turman's murder and the other crimes within a half-dozen hours of the event, the authorities inexplicably did not request Mrs. Turman to identify Darden in a line-up or in any other fashion until some four days later (R. 586; A. 37, 32). The identification that then occurred took place during Mrs. Turman's testimony at a preliminary hearing (A. 6-12), as petitioner sat with his counsel at the defense table – apparently the only black man among the few people in the courtroom (A. 51-54).

Mrs. Turman's testimony itself highlighted the suggestiveness of the circumstances of the identification. Asked by the court at the preliminary hearing whether she was sure that the man at the defense table was the assailant, she replied that "even with his back to me while I sat [at the rear of the courtroom] I reached over and touched my sister's hand and said, 'That's him' " (A. 11).

At trial, Mrs. Turman was permitted once again to identify petitioner as he sat at the defense table. To buttress this identification, the prosecution also brought out, on direct examination, the earlier identification

that she made. The prosecution questioned Mrs. Turman thus:

"Q. Do you remember when the funeral [of Mr. Turman] was?
A. Yes, sir, September 13th, on a Wednesday.
Q. You say you saw Mr. Darden the day after?
A. Yes, sir.
Q. Where was that?
A. At the preliminary hearing.
Q. Did you have any trouble identifying him on that date?
A. I did not.
Q. And again, you're absolutely positive?
A. Yes, sir." (A. 37).

ii. Mr. Arnold's identification of petitioner

In contrast to Mrs. Turman, Mr. Arnold was not permitted to tell the jury of his pretrial identification of petitioner (A. 95). Nonetheless, the reliability of his in-court identification was also marred by a wantonly and needlessly suggestive photo identification not long after the crime.

On September 11, 1973 – after counsel had been appointed for petitioner – two sheriff's deputies visited Mr. Arnold in the hospital, where he was recovering from his bullet wounds (A. 87-88, 72). According to Mr. Arnold's testimony, elicited out of the presence of the jury, he had by this time already read newspaper stories about the crime which almost certainly recounted the arrest of a suspect and his identity (A. 78-79).

The deputies, Mr. Arnold recalled, had shown him six photographs and asked whether he could identify his assailant from among them (A. 72-73, 88). Four he immediately rejected out of hand, for "they didn't look anything at all like him" (A. 74, 77-78). From the two

remaining photographs, Mr. Arnold selected that of petitioner (A. 74-75). The testimony disclosed, however, that his ability to make this choice was less than startling, for the picture of petitioner bore the name "Darden" and the date of his arrest, "9-9-73," facts of which Mr. Arnold was almost assuredly already aware (A. 76, 89).

Not long after this tainted identification, petitioner asked that Mr. Arnold be asked to identify him in a properly conducted line-up, but the prosecuting authorities refused the request (A. 94; R. 591).

D. The exclusion of death-scrupled veniremen

The trial court excluded five prospective jurors from petitioner's venire on the basis of their expressed convictions against the death penalty. Petitioner submits that at least two of these exclusions were patently inconsistent with *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and denied petitioner rights protected by the Due Process and Equal Protection clauses of the Fourteenth Amendment. The material portions of the jury selection proceeding are set forth in the appendix (A. 13-23).

SUMMARY OF THE ARGUMENT

Petitioner's conviction and death sentence must be set aside for several separate reasons.

I. As the Court has often recognized, prosecutorial misconduct before or during trial may involve such a probability of prejudice to a defendant as to constitute a denial of due process. Here, however narrow the

scope of review, the prosecution's wilfully irrelevant and inflammatory summation in a capital case in which the evidence of guilt was sharply contested deprived petitioner of a fair trial.

In *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), the Court identified a number of factors pertinent to a decision whether improper statements by the prosecution in closing argument are so likely to have influenced the jury's judgment as to infringe the defendant's constitutional rights. In contrast to the circumstances that prevailed in the *DeChristoforo* case, the prosecution's misconduct here pervaded the entire summation, was plainly intentional, was unprovoked by defense counsel and was unremedied by the trial court, despite objection. If the Due Process Clause of the Fourteenth Amendment imposes any limitations on prosecutorial conduct during closing argument, those bounds were surely exceeded by the state's attorneys in the present case.

II. Petitioner was deprived of due process of law by the admission in evidence upon the state's direct case of testimony as to a gratuitously suggestive pretrial identification. Several considerations compel the exclusion of such evidence without regard to the reliability of the identification. First, the reliability of evidence of a needlessly suggestive pretrial identification is almost always uncertain; moreover, the reliability of such evidence is inherently not susceptible to verification. Second, a rule of automatic exclusion will deter police from utilizing improper identification procedures. Third, such a rule will free the courts from elusive inquiries into the reliability of needlessly suggestive identifications. Together, these benefits outweigh the minimal interference with law enforcement consequent upon adoption of a *per se* rule and the resulting occasional exclusion of pretrial identification evidence that is, in

fact, of probative value, notwithstanding the uncertainty of its reliability and the gratuitiously suggestive circumstances in which it was elicited.

However, even if measured under a totality-of-the-circumstances standard, the identification evidence at petitioner's trial should have been excluded as unreliable under *Simmons v. United States*, 390 U.S. 377 (1968).

III. At the commencement of petitioner's trial, two prospective jurors were excused from the venire for cause by reason of their expression of tentative, abstract opposition to capital punishment. Because these veniremen were dismissed without inquiry sufficient to determine whether, notwithstanding the evidence or the court's instructions concerning the law, they would refuse to make an impartial decision as to the defendant's guilt or would automatically vote against imposition of a death sentence, their exclusions were inconsistent with the rules laid down by the Court in *Witherspoon v. Illinois*, 391 U.S. 510 (1968). The sentence of death imposed upon petitioner should, therefore, be set aside.

ARGUMENT

I.

THE PROSECUTION'S SUMMATION WAS SO SATURATED BY INFLAMMATORY AND IRRELEVANT ARGUMENT THAT PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL

This Court has frequently recognized that the circumstances of a state criminal trial or the prosecution's conduct at trial may so prejudice a defendant as

to deprive him of his constitutional right to a fair trial. *E.g., Miller v. Pate,* 386 U.S. 1 (1967); *Sheppard v. Maxwell,* 384 U.S. 333 (1966); *Estes v. Texas,* 381 U.S. 532 (1965); *Turner v. Louisiana,* 379 U.S. 466 (1965); *Brady v. Maryland,* 373 U.S. 83 (1963). Though some such rulings find their foundation in specific guarantees of the Bill of Rights, *e.g., Chambers v. Mississippi,* 410 U.S. 284 (1973), many others have been predicated upon the Due Process Clause of the Fourteenth Amendment alone. As the Court stated in *Estes v. Texas, supra,* 381 U.S. at 542-43: "[A]t times a procedure employed by the state involves such a probability that prejudice will result that it is deemed inherently lacking in due process."

The principles underlying these decisions are as applicable during closing arguments as at the other stages in a criminal prosecution. *Donnelly v. DeChristoforo,* 416 U.S. 637 (1974). "It may be," Justice Marshall stated for the Court in *Frazier v. Cupp,* 394 U.S. 731, 736 (1969), "that some remarks included in an opening or closing statement could be so prejudicial that a finding of error, or even constitutional error, would be unavoidable." While we are cognizant that this Court has not heretofore set aside any state court conviction because of the misconduct of the prosecution during summation, implicit in these rulings, as well as in others reviewing the conduct of federal prosecutors, *e.g., Viereck v. United States,* 318 U.S. 236 (1943); *Berger v. United States,* 295 U.S. 78 (1935), is the recognition that a closing argument may so descend into prejudicial irrelevancies or may so be infected by inflammatory discourse as to destroy the atmosphere necessary for the jury to conduct its deliberations fairly and impartially. See *Sheppard v. Maxwell, supra; Estes v. Texas, supra; Irvin v. Dowd,* 366 U.S. 717, 722 (1961).

To be sure, the standard of review here is "'the narrow one of due process'" and "not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice.'" *Donnelly v. DeChristoforo, supra,* 416 U.S. at 642, quoting in part from *Lisenba v. California,* 314 U.S. 219, 236 (1941). Still, we submit that the verdict in this capital case – infected as it was by a summation designed to incite the jurors to reach their verdict in a mood of anger and hatred toward the defendant and by consideration of matters wholly irrelevant to his guilt or innocence – should not be permitted to stand, even under this narrow scope of review.

We first scrutinize the prosecution's summation in detail and then measure it against the criteria employed by the Court in *Donnelly v. DeChristoforo, supra,* in determining whether the improprieties there alleged worked to deprive the defendant in that case of the right to a fair trial. We conclude this point by a brief consideration of the state's claim of harmless constitutional error.

A. The state improperly attempted to try petitioner for "offenses" of the state Division of Corrections

Prosecutor McDaniel, the second of the state's attorneys to sum up to the jury, argued repeatedly and at length that the jurors should not limit themselves to consideration of petitioner's guilt or innocence of the crimes charged in the indictment, but should convict him of first degree murder because the state Division of Corrections, which had authorized petitioner's weekend

furlough, could not be trusted to keep him in prison under any other circumstance. "As far as I am concerned," McDaniel began, "there should be another Defendant in this courtroom . . . and that is the division of corrections, the prisons" (A. 121). He continued:

> "As far as I am concerned . . . this animal was on the public for one reason. Because the division of corrections turned him loose, lets him out, lets him out on the public. Can't we expect him to stay in a prison when they go there? Can't we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking?" (A. 121)
>
> * * *
>
> "I wish that person or persons responsible for him being on the public was in the doorway instead of [the murder victim]. I pray that the person responsible for it would have been in that doorway and any other person responsible for it, I wish that he had been the one shot in the mouth. I wish that he had been the one shot in the neck, instead of [Phillip Arnold].
>
> Yes, there is another Defendant, but I regret that I know of no charges to place upon him, except the public condemnation of them, condemn them." (A. 121-22)
>
> * * *
>
> "Mr. Turman is dead because that unknown defendant we don't have in the courtroom allowed it. He is criminally negligent for allowing it." (A. 122)
>
> * * *
>
> "There is one person on trial, not the Polk County Sheriff's Office, not the Hillsborough Sheriff's office, but he and his keepers, the Division of Corrections." (A. 128)

Mr. McDaniel's last words to the jury repeated this theme: "I cannot help but wish that the Division of Corrections was sitting in the chair with him [the defendant]. Thank you" (A. 137).[3]

These inflammatory comments bore no rational relationship to the question of petitioner's guilt or innocence of the crimes with which he was charged in the indictment, the only offenses for which the state had a right to try him. Yet the trial court allowed the prosecution to argue to the jury at length that petitioner should be punished for an offense supposedly committed by the Florida Division of Corrections – an offense not charged in the indictment and one as to which no evidence had been presented.

A recent federal district court decision upon a state prisoner's application for habeas corpus dealt with a similar prosecutorial tactic. In *Malley v. Connecticut*, 414 F. Supp. 1115 (D. Conn. 1976) (appeal pending), the state's attorney had argued in his summation to the jury that the defendant should be convicted not merely by reason of the illicit drug transaction portrayed by the evidence but also because his conviction would strike a blow against the "Greenwich Village drug scene." In setting aside the conviction and issuing the writ, the court reasoned that the "obvious purpose of these remarks was to tell the jury that they could in some way strike out at 'the drug scene' or stamp out 'the drug problem' by convicting the petitioner." 414 F. Supp. at 1120. The court concluded that the prosecution's conduct constituted "a conscious attempt to prejudice the jury" in favor of conviction "as an

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[3] *See also* McDaniel's argument at A. 129: "He's even got a driver's license. Why in the world does–what in the world is a State prisoner doing with a driver's license? I wonder if the public is paying for it."

exhibition of their feelings toward" the so-called drug scene. *Ibid.*

McDaniel engaged in misconduct allied to that discussed above in urging during the guilt-determining stage of the bifurcated trial that the jury recommend imposition of the death penalty upon petitioner. The prosecutor's remarks were nothing less than a warning to the jury that the only way to assure that petitioner would not before long be free from jail was to recommend a death sentence; for that reason, he urged that the jurors find petitioner guilty of first degree murder rather than of any of the lesser offenses with which petitioner had been charged.

> "That's the only way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it. It's the only way that anybody can be sure of it now, because the people that turned him loose – this man served his time and if this man served his time as the Court has sentenced him, that's fine. If he's rehabilitated, fine. But let him go home on furloughs, weekend passes – not home, strike that, excuse me – go over with his girl friend for the weekend, go shoot pool for the weekend, go sell his guns, or gun, for the weekend, go consume drink in the bars over the weekend." (A. 123)

This inflammatory line of argument drew the jury's attention to an issue wholly immaterial to the determination of petitioner's guilt. Implicit in it was the contention that, were petitioner convicted of anything less than first degree murder and were he not put to death, he would serve only a short sentence or would be given furloughs and let "out on the public" again. Not only was this argument inflammatory and irrelevant to the issue of petitioner's guilt or innocence, but nothing in the record suggested that any such consequences would follow from a conviction for

offenses less than first degree murder. The prosecution nonetheless made this contention a central issue in summation and asked the jury to accept this "factual" premise on the prosecution's authority alone.

Such an argument, like the prosecutor's diatribe concerning the Division of Corrections, contributed nothing of legitimate concern to the jurors and could have had no effect other than to arouse their prejudices and distract them from their obligations. The prosecutor thus overtly encouraged violation of the rule that verdicts must be based upon the evidence and not upon appeals to emotion.

In *Bruce v. Estelle*, 483 F.2d 1031 (5th Cir. 1973), the Court of Appeals ordered the district court to grant a writ of habeas corpus because of a similarly improper prosecutorial summation. The Court held an earlier state competency proceeding constitutionally defective in substantial part because of the "highly inflammatory and prejudicial comments of the state counsel's closing arguments to the jury." 483 F.2d at 1039. Counsel had argued, incorrectly, that if the jury were to find that petitioner had been insane at the time of his trial he could not now be retried. " 'If you want him walking the streets of your county, you go ahead and let him out; find him insane at the time of his trial and you will have effectively let him out of prison. That's what you are facing in your decision in this trial.' " *Id.* at 1040. The language of the Court of Appeals in that case is fully applicable here:

> "Such emotional, erroneous and prejudicial comments have no place in a dispassionate resolution of the question whether [petitioner] was competent in 1965 to stand trial.
>
> These comments most probably infected the whole decision-making process of the jury. State counsel knew that [petitioner] could be retried and his

assertion to the jury that he could not was erroneous. Such irrelevant diatribes cannot be countenanced." *Ibid.*

B. The state sought to prejudice the jurors by appealing improperly to their emotions

McDaniel's repeated expression during summation of his wish that Darden had been maimed or killed further contributed to the denial of petitioner's constitutional right to a fair trial. Over and over again, the prosecutor made comments like the following:

> "I wish [Mr. Turman] had had a shotgun in his hand when he walked in the back door and blown his face off. I wish that I could see him [petitioner] sitting here with no face, blown away by a shotgun, but he didn't. . . . I wish someone had walked in the back door and blown his head off at that point." (A. 125-26)

McDaniel returned to this theme when he described the five times that the alleged murder weapon had been fired. He explained that this left one bullet in the chamber. "[Darden] didn't get a chance to use it. I wish he had used it on himself" (A. 133). He made a similar comment in describing petitioner's automobile accident: "I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time" (A. 134). Finally, while discussing the claim that petitioner had changed his appearance between the date of the crime and that of the trial, McDaniel gratuitously commented that "[t]he only thing he hasn't done that I know of is cut his throat" (A. 136).

It should require no citation to authority to establish that the repetition of this theme grossly exceeded the limits of permissible argument. The quoted statements

were nothing more than a calculated attempt by the prosecution to transmit its hatred of petitioner to the jurors and to make that hatred a factor in their decision-making. See *United States ex rel. Haynes v. McKendrick*, 481 F.2d 152 (2d Cir. 1973). *Cf. Kelly v. Stone*, 514 F.2d 18, 19 (9th Cir. 1975) (reversing a denial of habeas corpus relief, *inter alia*, on the basis of the following portion of a district attorney's closing argument: " 'Because maybe the next time it won't be a little black girl from the other side of the tracks; maybe it will be somebody that you know; maybe it will be somebody that I know. And maybe the next time he'll use the knife . . . .' ")

C. The state improperly placed the prosecutors' personal credibility in issue

Both prosecutors also engaged in blatantly improper argument by placing in issue their own credibility and opinions and those of their office. *E.g., Hall v. United States*, 419 F.2d 582 (5th Cir. 1969); *Dunn v. United States*, 307 F.2d 883 (5th Cir. 1962); *Greenberg v. United States*, 280 F.2d 472 (1st Cir. 1960).

Mr. White, who spoke first, was responsible for the most flagrant example of this. He concluded his argument to the jury with the following words:

> "I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life." (A. 120)

This statement was, of course, grossly improper. *Cf. Kelly v. Stone, supra*, where the court characterized as "a highly improper expression of personal opinion" the

following, less explicit comment: " 'If you can't find the defendant guilty on the facts that I have presented to you, I feel like I just might as well, you know, close up shop and go home. . . .' " 514 F.2d at 19. But it was by no means the only instance in which the prosecutors added the weight of their own opinions to the trial testimony.

Mr. McDaniel, for example, repeatedly offered the jury his opinion that petitioner was not a man worthy of belief. Since petitioner's defense consisted largely of his own alibi testimony, the prejudice from such remarks is manifest. McDaniel's statements included the following:

> a. Petitioner testified that he had asked for a lie detector test. In discussing that testimony, McDaniel said: "I don't believe anything he says . . ." (A. 131).
>
> b. Petitioner testified that his alibi was the truth. McDaniel attacked this testimony in the following way: "Well, let me tell you something: If I am ever over in that chair over there, facing life or death, life imprisonment or death, I guarantee you I will lie until my teeth fall out" (A. 124).
>
> c. Petitioner testified that he remembered the precise times of several events that occured during the day of the murder. These statements were a crucial part of his testimony for, if true, they established that he could not have been in the Turman furniture store at the time of the crime. McDaniel's response: "I couldn't even tell you right now what day I put a witness on the stand this week" (A. 130).
>
> d. Petitioner testified that he stopped at a service station after his automobile accident, seeking assistance—testimony that was confirmed by one of the state's own witnesses. Yet McDaniel recounted Darden's testimony and said: "That's what he says. I don't know that he stopped at any. . . . I guarantee you he was not going back to the scene of the accident until he had gotten home" (A. 135).
>
> e. In addition to telling the jury that he thought petitioner a liar, McDaniel also suggested in a thinly veiled way that he knew of other instances where petitioner had shot people: "Darden doesn't like people who move after he shoots them in the mouth" (A. 127).

The impropriety of each one of these statements of personal opinion by the prosecution is beyond question. Taken together, they contributed in substantial measure toward the denial of a fair trial to the defendant.

The several reasons why expressions of personal opinion by counsel have long been outlawed were well stated by the First Circuit in *Greenberg v. United States, supra,* 280 F.2d at 475 (1960). Judge Aldrich wrote:

> "To permit counsel to express his personal belief in the testimony [of a witness] (even if not phrased so as to suggest knowledge of additional evidence not known to the jury), would afford him a privilege not even accorded to witnesses under oath and subject to cross-examination. Worse, it creates the false issue of the reliability and credibility of counsel. This is peculiarly unfortunate if one of them has the advantage of official backing."

D. The state's summation also included other forms of improper argument

McDaniel's summation also contained numerous other instances of improper argument, which, perhaps taken alone and surely when taken together with those

already discussed, nullified petitioner's right to a fair trial. Some of McDaniel's comments, for example, tended to interfere with petitioner's right to the effective assistance of counsel by commenting in a deprecatory way on his exercise of that right. Indeed, McDaniel began his argument by telling the jury in effect that it should pay no attention to the argument of defense counsel that would follow because all defense lawyers always made the same arguments:

> "Now [defense counsel] and I am positive, and I assure you and I guarantee you that [defense counsel] will try the Polk County Sheriff's Office; he will try the Polk County Sheriff's Office; and he will try me. And he will try Mr. White. I guarantee that, because he has notes I gave him many years ago." (A. 121)

The inarticulate premises were, of course, that all arguments by defense counsel are fabrications and that all defendants are guilty.

McDaniel committed similar misconduct when he discussed petitioner's statement that he would take a lie detector test if his attorney were present. McDaniel said:

> "Well, only an incompetent lawyer would allow Darden to take a lie detector test. And that prisoner, with those convictions on his record, knows that" (A. 131).

Finally, throughout his argument McDaniel repeatedly referred to aspects of petitioner's conduct while on weekend furlough from prison that were entirely unrelated to the offenses with which he was charged. Suggestive references to petitioner's relationship with his girlfriend and other comments of like character (A. 122, 128, 129) could have had no other effect than to imply to the jury that petitioner was a

"bad man" and therefore probably committed the offenses charged in the indictment. *Cf. Manning v. Jarnigan*, 501 F.2d 408, 412 (6th Cir. 1974).

E. Under the standards enunciated in *Donnelly v. DeChristoforo*, the prosecution's summation deprived petitioner of a fair trial

In *Donnelly v. DeChristoforo, supra,* the Court set forth criteria to be utilized in measuring whether misconduct by a prosecutor during summation has worked a deprivation of the right to a fair trial. The factors identified in *DeChristoforo* include: 1) the length and frequency of the prejudicial statements in proportion to the total length of the summation and the likely impact of these statements on the jury; 2) whether the statements were intentional and, if so, whether they were provoked by defense counsel; and 3) whether the trial judge promptly took appropriate corrective steps and, if so, the likely effectiveness of those steps. Under these criteria, it is clear that the prosecutor's closing argument in the present case deprived Darden of due process of law.

In *DeChristoforo*, the Court found that the challenged remarks of the prosecutor, though improper, had not deprived DeChristoforo of a fair trial. The statements at issue were cnly "a few brief sentences in the prosecutor's long . . . closing argument which might or might not suggest to a jury that the respondent had unsuccessfully sought to bargain for a lesser charge." 416 U.S. at 647.

In the case at bar, by contrast, the record shows clearly that the prosecutor's improper remarks were neither isolated nor ambiguous. McDaniel's inflammatory and irrelevant comments took up more of his

closing argument than did his consideration of the evidence. Unlike the prosecutor in *DeChristoforo*, who merely suggested, inadvertently or ambiguously, that respondent had admitted his guilt, McDaniel attempted, repeatedly and at length, to poison the atmosphere of the trial and deprive petitioner of his right to an objective, impartial jury. Nor could the jurors have misapprehended the prosecutor's meaning. The defendant, he told them unequivocally over and over again, was wholly unworthy of belief and deserved to be treated as a wild animal;[4] only through a conviction for first degree murder and recommendation of a death sentence by the jury might the public be secure against him.

In *DeChristoforo*, this Court concluded that the prosecutor's misconduct was not intentional principally because the challenged remark was isolated and ambiguous and could easily have slipped out in the heat of argument. "[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." 416 U.S. at 647.

McDaniel's remarks, in contrast, could only have been intentional, his lip service to the canons of ethics notwithstanding (A. 122). He repeated the improper themes over and over again. There can likewise be no doubt that the jury understood the prosecutor's meaning – his remarks could only have been taken as encouragement to reach a decision on petitioner's guilt

[4] *E.g.*, "This person [petitioner] was an animal, this animal was on the public for one reason. . . . He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash" (A. 121).

based on conduct of the Division of Corrections and in an atmosphere charged with hatred.

Moreover, the record is clear that the defense attorneys did nothing that might have "provoked" the prosecutors. Indeed, we submit that nothing they could have said would ever excuse conduct like that of the prosecution during summation in the case at bar.

In *DeChristoforo*, the prosecutor's remark, "ambiguous" and "but one moment in an extended trial," "was followed by specific disapproving instructions." 416 U.S. at 645. By contrast, the trial court in the present case, instead of admonishing the jury that the prosecutor's remarks were improper and directing the jury to ignore them, overruled petitioner's objection without comment (A. 136). Rather than striving at least to mitigate the impact of the prosecutor's misconduct, the court allowed the jury to believe McDaniel's argument was proper and worthy of consideration.

We submit, however, that even if the court had sustained petitioner's objection, reprimanded the prosecutor and instructed the jury to disregard the improper portions of his argument – or even if the court's general instructions on the role of argument were read as addressing this question (A. 103-04; R. 863-64) – petitioner would still be entitled to a reversal of his conviction, for the inflammatory nature of McDaniel's summation was "too clearly prejudicial for . . . a curative instruction to mitigate [its] . . . effect" *Donnelly v. DeChristoforo, supra*, 416 U.S. at 644; *cf. Kelly v. Stone, supra*, 514 F.2d at 19.

In sum, the very considerations that led the Court to conclude that the prosecution's conduct in the *DeChristoforo* case did not work a denial of due process of law to the respondent there, all compel an opposite conclusion in the case at hand. As the Court stated in *Berger v. United States*, 295 U.S. 78, 89

(1935): "[W]e have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury . . . ."[5]

F. The prosecution's misconduct was not harmless constitutional error

Because the state's response to the discussion of the summation question in our petition for certiorari relied principally upon a claim of harmless constitutional error, we add a few thoughts to make plain the unavailability of such a refuge to the prosecution.

"The question," the Court said in *Chapman v. California*, 386 U.S. 18 (1967),

[5] The Standards Relating to the Prosecution Function adopted not long ago by the American Bar Association Project on Standards for Criminal Justice serve further to highlight just how far the prosecution's conduct here departed from that to be expected of responsible state's attorneys. Part V of the Standards sets forth specific guides as to the forms of argument that a prosecutor is prohibited from utilizing in summation. The pertinent rules are these:

> "(b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
>
> "(c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
>
> "(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict."

Beyond question, the closing argument to the jury here infringed each of these rules not once but many times over.

> " 'is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'
>
> * * * * *
>
> ". . . the burden [is] on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.
>
> * * * * *
>
> ". . . before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 23-24 (footnote omitted), quoting in part from *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963).

Applying these standards in *Chapman* itself, the Court reversed the convictions at issue, despite what it characterized as a "reasonably strong 'circumstantial web of evidence,' " reasoning that the case was one "in which, absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts." 386 U.S. at 25-26.

Evaluated in these terms, the prosecutorial misconduct in the present case assuredly cannot be deemed to have been harmless. As we pointed out in our statement of the case, the evidence against Darden was anything but overwhelming. The nub of the prosecution's proof was the identification testimony of Mrs. Turman and Mr. Arnold – identifications which were sharply challenged at trial and which, as we discuss in the next two points of our argument, were infected by needlessly suggestive prosecutorial conduct.[6] Apart

[6] Multiple identifications, of course, provide no assurance of accuracy when all identifying witnesses "have been subjected to a suggestive identification procedure." P. Wall, *Eye-Witness Identification In Criminal Cases* 11 (1975).

from these disputed identifications, the only evidence of consequence proffered by the prosecution was that showing that a pistol of the caliber used in the crime and from which four bullets had been discharged had been found adjacent to the highway not far from the location of Darden's automobile accident. However, notwithstanding an FBI study, the pistol was not shown to have been fired at a time contemporaneous with that of the crime nor was ballistic or other evidence offered directly connecting the gun to the crime.

In these circumstances we submit that any suggestion that the evidence of petitioner's guilt was overwhelming or that McDaniel's tactics were "harmless beyond a reasonable doubt" cannot be taken seriously. Indeed, the very fact that the prosecution chose to sum up in so blatantly improper and inflammatory a fashion is itself indicative of the doubtfulness of the case for conviction, for surely no prosecutor in his senses would risk a reversal by indulging in such tactics if he believed the state's proof was overwhelming.

Moreover, even the majority opinion in the Supreme Court of Florida was candid enough to acknowledge that McDaniel's conduct was improper and to recognize that the "language used by the prosecutor would have possibly been reversible error if it had been used regarding a less heinous set of crimes." *Darden v. State*, 329 So.2d 287, 290 (Fla. 1976). Turning logic on its head, however, the court concluded that, in light of the nature of the crimes, McDaniels' repeated improprieties were "fair comment" on the evidence. *Ibid.*

Even if the prosecutor's inflammatory discourse had, in fact, been germane to the evidence, the Florida court would have been wrong in implicitly suggesting that greater latitude for prosecutorial misconduct may be countenanced upon a trial for first-degree murder than when the crime is of lesser viciousness or severity. The

demands of due process do not vary inversely with the seriousness of the charge; the Constitution requires that when life is at stake, the concern that a defendant receive a fair trial be at its greatest. *Reid v. Covert*, 354 U.S. 1, 65 (1957) (Harlan, J. concurring); *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

Some forty years ago Justice Sutherland wrote for the Court that, while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). To permit the state to find refuge in a plea of harmless constitutional error in the face of the closing arguments at petitioner's trial would invite prosecutors everywhere to strike "foul blows" in summation with confidence that their misconduct would go unchecked by constitutional remedy. The Court should decline to afford such license to state's attorneys by reversing petitioner's conviction.

II.

THE TRIAL COURT'S FAILURE TO EXCLUDE EVIDENCE OF MRS. TURMAN'S WANTONLY AND GRATUITOUSLY SUGGESTIVE PRETRIAL IDENTIFICATION OF PETITIONER DEPRIVED HIM OF DUE PROCESS OF LAW

The trial court permitted Mrs. Turman, the wife of the murder victim, to testify that she had identified petitioner at a preliminary hearing conducted some five days after the crime. Mrs. Turman's testimony was central to the prosecution's case since, as we have already said, the identification of petitioner was the only evidence directly connecting him to the crime.

We show below that the circumstances under which Mrs. Turman's pretrial identification occurred were

"unnecessarily suggestive and conducive to irreparable mistaken identification," *Stovall v. Denno*, 388 U.S. 293, 302 (1967), and that the prosecution's use at trial of testimony as to the earlier identification therefore requires reversal of petitioner's conviction. *Compare Foster v. California*, 394 U.S. 440 (1969); *Brathwaite v. Manson*, 527 F.2d 363 (2d Cir.), *cert. granted*, 96 Sup. Ct. 1737 (1976) (argued November 29, 1976); and *Palmer v. Peyton*, 359 F.2d 199 (4th Cir. 1966), *with United States ex rel. Kirby v. Sturges*, 510 F.2d 397, 403 (7th Cir.), *cert. denied*, 421 U.S. 1016 (1975).

The Court last addressed the question of the proper test to be applied in determining whether to exclude evidence at trial of an impermissibly and unnecessarily suggestive pretrial identification in *Neil v. Biggers*, 409 U.S. 188 (1972). In that case both the pretrial confrontation and the trial had taken place prior to the Court's decision in *Stovall v. Denno*, *supra*, which held that the Fourteenth Amendment right to a fair trial may require the exclusion of identification evidence obtained as a result of suggestive pretrial confrontations.

In *Biggers* the Court acknowledged the dangers inherent in suggestive confrontations[7] but refused to impose a strict rule excluding evidence of unnecessarily suggestive pretrial identifications without regard to their reliability. The Court explained that the principal purpose of a *per se* rule of exclusion would be deterrence of improper police conduct, 409 U.S. at 199, and concluded that such a rule would not be warranted in the circumstances then before it since, until *Stovall*, police conduct could not have been influenced by the rules there articulated. Hence, the Court held that the standard to be applied, at least for

[7] *See also, e.g., United States v. Wade*, 388 U.S. 218 (1967).

pre-*Stovall* identifications, was the less rigorous one enunciated in *Simmons v. United States*, 390 U.S. 377, 384 (1968): whether, under the totality of the circumstances, the particular identification procedure "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Neil v. Biggers, supra*, 409 U.S. at 198.

Biggers left open the question whether the Constitution requires more stringent prophylactic rules in cases, such as the present one, in which both the identification and the trial post-date *Stovall*. See Grano, *Kirby, Biggers, and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?* 72 Mich. L. Rev. 717, 777 (1974).

A. The preliminary hearing was unnecessarily and impermissibly suggestive

Mr. Turman was killed on September 8, 1973. Five days later, on September 13, 1973, a brief preliminary hearing was held; Mrs. Turman was the only witness. Petitioner, who was seated with his attorney at the defense table, was apparently the only black person in the courtroom, and was certainly the only black person at the defense table (A. 51-53).[8] After a few questions by the prosecutor, the Court interrupted and the following colloquy took place:

"THE COURT: Ask her to identify.
MR. MARS [the prosecutor]: Yes, sir.
Q: Can you see this man sitting here?
MR. HILL [the public defender]: Your Honor,

[8] At trial the Court denied a motion to suppress, accepting for purposes of deciding the motion that petitioner had been the only black in the room at the time of the identification (A. 35-36).

I am going to object to that type of identification.
THE COURT: I am not. Sit down.
MR. HILL: Judge –
THE COURT: Not under these circumstances, Mr. Hill.
MR. HILL: Judge, even as a defense attorney, that shows no respect in court, much less for the Court, and I ––
THE COURT: I appreciate ––
MR. HILL: And the objection, I want on the record.
THE COURT: I appreciate that. It's on the record. This woman has had a traumatic experience and she ––
MR. HILL: Judge, I appreciate that. I still have an obligation to my client.
THE COURT: I appreciate that. Now, if you want to be held in contempt, you pardon me. Alright, go ahead.
Q. Is this the man that shot your husband?
A. Yes, sir." (A. 8-9)

Plainly, the procedures followed at the preliminary hearing were impermissibily suggestive within the meaning of *Stovall.* As the Court there said,

> "[t]he practice of showing suspects singly to persons for the purpose of identification and not as part of a lineup, has been widely condemned." 388 U.S. at 302 (footnote omitted).

Cf. Foster v. California, supra, 394 U.S. at 443. Indeed, the exhibition of a single suspect to a witness has been characterized as "the most suggestive and, therefore, the most objectionable method of pretrial identification," *United States v. Dailey,* 524 F.2d 911, 914 (8th Cir. 1975), and as "the most grossly suggestive identification procedure now or ever used by the police." P. Wall, *Eye-Witness Identification in Criminal Cases* 28 (1975).

The inherent defect in a procedure like that followed at petitioner's preliminary hearing is, of course, that the state in effect has said to the witness: "We have captured the criminal. Here he is. Don't you agree?" *Cf. Foster v. California, supra,* 394 U.S. at 443 ("In effect, the police repeatedly said to the witness, '*This* is the man.' ") (emphasis in original); *United States ex rel. Kirby v. Sturges, supra,* 510 F.2d at 403.

Mrs. Turman's testimony at trial and at the preliminary hearing shows that the prosecution had made her identification of petitioner "all but inevitable," *Foster v. California, supra,* 394 U.S. at 443, regardless of whether he had, in fact, shot her husband. In response to cross-examination at trial, Mrs. Turman demonstrated that the prosecution had made perfectly clear to her why she had been invited to the preliminary hearing.

> "Q. Do you remember why you were there?
> A. To identify him." (A. 32)

Clearly, she understood before she arrived at the preliminary hearing – which is, after all, a step in the formal accusatory process – that the police had captured the person they believed was her husband's murderer, and that she was expected to confirm their choice by identifying him. *Cf. Sanchell v. Parratt,* 530 F.2d 286, 294 (8th Cir. 1976). See P. Wall, *supra,* at 47.

Mrs. Turman's testimony at the preliminary hearing itself pointed up just how suggestive the procedure actually was.

> "THE COURT: Are you sure about the identification of this man you see in front of you as being the same man that you've spoken about?

A. Even with his back to me while I sat back there, I reached over and touched my sister's hand and said, 'That's him.' " (A. 11)

Everyday experience tells us that even those we have known long and intimately cannot be recognized with any confidence when their backs are to us. Surely Mrs. Turman could not have had greater certainty about the identity of a total stranger whom she had seen for only a brief time under the most trying of circumstances. Rather, her selection as the criminal of a man she saw from the rear as she sat in the courtroom was plainly the product of her knowledge that the suspect already arrested by the police would be present at the hearing and of the mere presence in the courtroom of a lone black man. The setting all but assured that any black man who had the misfortune to be seated at the defense table would be chosen by Mrs. Turman as the assailant.

The suggestiveness of the procedure utilized by the prosecution was enhanced still further, first by the court's pointed introduction to the procedure ("Ask her to identify"), which again demonstrated to Mrs. Turman if, somehow, she did not already know, that she was expected to identify petitioner, and then by the prosecutor's leading questions ("Can you see this man sitting here?"; "Is this the man that shot your husband?"). Any doubts about the cumulative effect of the suggestive elements of this confrontation are resolved by Mrs. Turman's testimony, again on cross-examination at trial, that the prosecutor's questions directed her attention to petitioner:

"Q: But he did in some way through the record of what was asked in the answers that were given indicate this man here?
A: I would say yes.

* * *

Q: Mrs. Turman, just a couple of questions. At that preliminary hearing that Mr. McDaniel and I both have been talking about, in your mind was there any question who Mr. Mars was referring to when he asked the question, 'Is that the man that killed your husband?'
A: No, there was no doubt in my mind.
Q: As to who he was referring to?
A: Right." (A. 54, 64).

It is clear, also, that the prosecution's use at trial of testimony of Mrs. Turman's earlier suggestive identification should have been wholly unnecessary. Petitioner was taken into custody within a few hours of the crime, and there was surely ample opportunity between his arrest and the preliminary hearing five days later to conduct a line-up consistent with petitioner's constitutional rights. Significantly, at no point in these proceedings has the state come forward with even a suggestion of a reason for its failure to do so. *Cf. Smith v. Coiner,* 473 F.2d 877, 881 (4th Cir.), *cert. denied sub nom. Wallace v. Smith,* 414 U.S. 1115 (1973).

B. Mrs. Turman's testimony concerning her pretrial identification of petitioner should have been barred under a strict rule of exclusion[9]

This Court and others have repeatedly observed that there is no constitutional right to a non-suggestive identification proceeding; a due process violation takes place, if at all, only when evidence of an unnecessarily suggestive confrontation is introduced at trial. *E.g., Stovall v. Denno, supra.* Nevertheless, we think that the

[9] We are, of course, familiar with the arguments on this subject advanced in the briefs submitted to this Court in *Brathwaite v. Manson, supra.*

Constitution compels a strict rule of exclusion to protect the fundamental constitutional right to a fair trial by deterring improper police identification procedures, *cf. United States v. Wade, supra,* 388 U.S. at 235; *Gilbert v. California,* 388 U.S. 263, 272-74 (1967), and by minimizing the risk of convictions based on evidence the reliability of which is in doubt and inherently unascertainable.

We take as our starting point the Court's opinion in *Michigan v. Tucker,* 417 U.S. 433 (1974). Tucker had been interrogated by the police without having been informed that, if he could not afford to retain an attorney, counsel would be appointed for him. Even though the interrogation took place prior to *Miranda v. Arizona,* 384 U.S. 436 (1966), Tucker's own statement was, of course, excluded. See *Johnson v. New Jersey,* 384 U.S. 719 (1966). During the interrogation, however, Tucker had voluntarily supplied the police with the name of a witness, Henderson, who later gave a statement tending to inculpate Tucker. The issue in *Tucker* was whether the trial court should also have excluded Henderson's statement.

The Court noted that the "Miranda warnings" are judicially-imposed prophylactic rules designed to protect the underlying Fifth Amendment right against compelled self-incrimination; they are not themselves mandated by the Constitution. *Michigan v. Tucker, supra,* 417 U.S. at 444-45; *Miranda v. Arizona, supra,* 384 U.S. at 467. Nevertheless, in an opinion by Justice Rehnquist, the Court concluded that it would be appropriate to exclude evidence obtained in violation of *Miranda*'s procedural protections, even if the Fifth Amendment itself had not been violated, if the benefits of the exclusion outweighed its costs. 417 U.S. at 446, 450-51. *See also, Brown v. Illinois,* 422 U.S. 590, 609 (1975); *United States v. Peltier,* 422 U.S. 531 (1975);

United States v. Calandra, 414 U.S. 338, 347-52 (1974); *Weeks v. United States* 232 U.S. 383 (1914).[10]

We show below that application of the cost-benefit analysis of *Tucker* to the use at trial of evidence of wantonly and gratuitously suggestive pretrial identifications requires the exclusion of such evidence without regard to its probative value. First, the reliability of such evidence is always uncertain and is inherently not susceptible to verification. Second, a *per se* rule excluding such evidence will conserve judicial resources by freeing courts from protracted, will-o-the-wisp inquiries into the reliability of identifications made in needlessly suggestive circumstances. Finally, such a rule will deter improper police procedures and thereby minimize the risk of the admission of evidence of questionable reliability. These benefits, when weighed against the trival costs of a *per se* rule in the administration of justice, require the rule's adoption.

1. The reliability of evidence of wantonly suggestive identifications is inherently unascertainable

This Court has repeatedly recognized that the suggestiveness of an identification procedure is at best difficult to determine and that its impact on a witness is often impossible to assess. *E.g., Foster v. California, supra; Stovall v. Denno, supra.* The use at trial of

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[10]In *Tucker* the balancing of interests militated against the extension of *Miranda*'s exclusionary rule to Henderson's statement. First, the probability was high that Henderson's statement was reliable, since it was not coerced. 417 U.S. at 448-49. Second, deterrence, which assumes negligent or willful police misconduct, *id.* at 447, would not have been furthered by a rule of exclusion because the police had acted in accordance with the then prevailing rules of *Escobedo v. Illinios,* 378 U.S. 478 (1964). *Cf. Neil v. Biggers, supra,* 409 U.S. at 199.

evidence of an identification proceeding as wantonly suggestive as the preliminary hearing in the case at bar is thus improper in large measure because such a proceeding cannot test the witness' ability accurately to identify the criminal.

Neither court nor jury can be expected to divine with any reasonable degree of confidence whether such an identification is the product of the suggestion inherent in the proceeding or of the witness' initial observation of the criminal. An identification made at such a confrontation is, thus, not in any meaningful sense "reliable"[11]; for that reason its use as part of the prosecution's case-in-chief deprives the defendant of due process of law. *Neil v. Biggers, supra,* 409 U.S. at 198; *see also United States ex rel. Kirby v. Sturges, supra. Cf. United States v. Wade, supra.* The Court in *Stovall* recognized this and therefore asked not whether the identification was reliable or correct but whether "the *confrontation* conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law." 388 U.S. at 301-02 (emphasis added).[12]

In *Foster v. California, supra,* the only case other than *Biggers* involving testimony of an unnecessarily suggestive pretrial identification to have reached the Supreme Court, the Court again recognized the impossibility of assessing the impact of suggestion and applied the *Stovall* standard. It held that an identification made under such circumstances "so determined the reliability of the eyewitness identification as to violate due process." 394 U.S. at 443.

In *Foster* a witness identified the defendant only after three separate, suggestive identification procedures. The Court reversed Foster's conviction without discussion of either the witness' opportunity to observe the criminal or of the "reliability" of the witness' identification, because the procedures were so suggestive that the likelihood of misidentification was high. *Neil v. Biggers, supra,* 409 U.S. at 198. The Court did not consider the correctness of the identification.

It is important to contrast the problem presented in the case at bar – and in *Stovall* and *Foster* – with the problem raised by such cases as *Coleman v. Alabama,* 399 U.S. 1 (1970) and *Simmons v. United States, supra. Stovall* and *Foster* ask when a witness may properly testify to an earlier wantonly suggestive identification. *Coleman* and *Simmons* assume a suggestive confrontation about which a witness may not

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[11]See Grano, *Kirby, Biggers, and Ash, supra,* 72 Mich. L. Rev. at 782: "Unlike lineups, showups fail to provide independent verification of the witness's ability to identify the offender. A yes-no procedure is much more conducive to unchecked guessing than a procedure which requires the witness to choose from several potential defendants" (footnote omitted). *Cf. United States v. Wade, supra,* where the Court said, while explaining why cross-examination was insufficient protection against unfair lineups,

> "the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself." 388 U.S. at 235.

[12]The sole authority relied on by the *Stovall* Court was *Palmer v. Peyton,* 359 F.2d 199 (4th Cir. 1966), which "clearly regarded the purpose of the due process rule as the exclusion of evidence obtained by outrageously suggestive and, therefore, potentially prejudicial means." Pulaski, *Neil v. Biggers: The Supreme Court Dismantles the Wade Trilogy's Due Process Protection,* 26 Stan. L. Rev. 1097, 1109 (1974).

testify, and ask whether the witness may nevertheless testify about a subsequent identification. Such testimony is admissible if the later identification stems from a source independent of the concededly suggestive earlier confrontation. *United States v. Wade, supra,* 388 U.S. at 241-243.[13] See Note, 73 Col. L. Rev. 1169, 1172-73, 1181 n. 100 (1973); Pulaski, *supra,* 26 Stan. L. Rev. at 1113. The *Simmons* standard thus does not contemplate the validation of a suggestive identification.

2. The attempt to evaluate the reliability of suggestive identifications has resulted in confusion

As Justice Stevens, writing for the Court of Appeals for the Seventh Circuit, recognized in *United States ex rel. Kirby v. Sturges, supra,* the conclusion that the reliability of suggestive identifications cannot be measured assumes that judges cannot distinguish between "identification evidence which is so unfair as to be constitutionally inadmissible, and that which state courts may permit juries to assess. . . ." 510 F.2d at 407.

We have already shown that, as a matter of principle, this must be so. The following cases demonstrate that attempts to make that distinction, under a "totality of the circumstances" test, have resulted in widely divergent conclusions about the proper application of such a test. See, *e.g., Neil v. Biggers, supra,* 409 U.S. at 200-01; *United States v. Russell,* 532 F.2d 1063 (6th Cir. 1976); *Sanchell v. Paratt,* 530 F.2d 286 (8th Cir.

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[13]Since the Court decided *Stovall* and *Wade* on the same day, the failure to consider the independent basis question, either in *Stovall* or, subsequently, in *Foster* is particularly significant confirmation of this explanation of the difference between the standards adopted in *Stovall* and *Simmons.*

1976); *United States ex rel. Cannon v. Smith,* 527 F.2d 702 (2d Cir. 1975); *United States v. Dailey, supra*; *United States v. Bowie,* 515 F.2d 3 (7th Cir. 1975); *Holland v. Perini,* 512 F.2d 99 (6th Cir.), *cert. denied,* 423 U.S. 934 (1975); *Brathwaite v. Manson, supra; Smith v. Coiner, supra; Dixon v. Hopper,* 407 F. Supp. 58 (M.D. Ga. 1976); *Thomas v. Leeke,* 393 F. Supp. 282 (D. S.C. 1975).

At the very least it is apparent from these and the legion of other, similar cases, that an inordinate amount of judicial energy is consumed attempting to answer a question that is inherently unanswerable, under conditions where the accuracy of any answer reached can never be determined.

3. The exclusion of evidence of suggestive identifications without regard to reliability is consistent with the Court's treatment of coerced confessions

The view that it is appropriate to exclude evidence of unnecessarily suggestive identifications without inquiry into the reliability of each such identification is consistent with the rules established for the exclusion of coerced confessions prior to *Miranda.* Thus, in *Jackson v. Denno,* 378 U.S. 368 (1964), the Court

> "made clear that the truth or falsity of a statement is not the determining factor in the decision whether or not to exclude it. [Citation omitted.] Thus a State which has obtained a coerced or involuntary statement cannot argue for its admissibility on the ground that other evidence demonstrates its truthfulness." *Michigan v. Tucker,* 417 U.S. at 448 n. 23.

Coerced confessions are presumed unreliable. *Jackson v. Denno, supra,* 378 U.S. at 386-87.

The case for excluding evidence of impermissibly suggestive identifications is even stronger. When a court considers a confession, there are usually extrinsic facts to which it can turn. Hence, it is usually possible to decide whether the confession is consistent with other, known facts and is, therefore, "reliable." In the identification context, however, extrinsic facts can tell the court no more than whether the witness had an adequate opportunity to observe the criminal at the time of the commission of the crime. They cannot tell the court whether or to what extent the identification made under suggestive conditions is in fact the product of the suggestion.

4. A *per se* rule excluding evidence of suggestive identifications would deter the police from using suggestive identification procedures and thereby minimize the risk of the introduction of unreliable evidence at trial

Biggers recognized that a principal justification "of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available . . . ." 409 U.S. at 199. *Cf. Gilbert v. California, supra,* 388 U.S. at 273. This goal is of obvious importance, both because it would contribute substantially to the integrity of the judicial system and because it would reduce the risk of convictions based on unreliable evidence. *Mapp v. Ohio,* 367 U.S. 643 (1961). *See also, United States v. Calandra, supra,* 414 U.S. at 347-52.

The facts of this case, as well as the frequency with which identification problems arise in the lower courts, show that the need for deterrence remains great despite this Court's growing line of decisions establishing

standards for the exclusion of improper identification evidence. See Grano, *"Kirby, Biggers and Ash," supra,* 72 Mich. L. Rev. at 723-24.

In the present case, the prosecution's use of Mrs. Turman's pretrial identification in its case-in-chief was clearly willful and unnecessary. Both the identification and trial took place after *Stovall,* so the police should certainly have been alerted to the possible consequences of using unreliable identification procedures. The prosecution could easily have conducted a lineup prior to the preliminary hearing or, if it had confidence in Mrs. Turman's observation of the criminal at the time of the crime, afterwards. It did neither. Nor was the prosecution under any obligation to use a pretrial identification in its direct case at all. The use of Mrs. Turman's preliminary hearing identification is thus a prime example of the kind of conduct that can and should be deterred.

Only the strict rule of exclusion proposed here is likely to have the necessary deterrent impact. Since it is relatively simple to structure a fair lineup or photo display, law enforcement officials will not be unduly burdened and, since the impact of the rule will be confined solely to gratuitously improper police procedures, problems similar to those encountered in the application of the Fourth Amendment exclusionary rule, which often requires the exclusion of evidence seized as a result of "good faith" Fourth Amendment violations, will be avoided. It is in precisely this sort of context that

> "the deterrent value of the exclusionary rule is most likely to be effective, and the corresponding mandate to preserve judicial integrity . . . most clearly demands that the fruit of official misconduct be denied." *Brown v. Illinois, supra,* 422 U.S. at 611 (Powell, J., concurring).

The less rigorous "totality of the circumstances" rule is likely to have little deterrent impact. If a prosecutor is permitted to establish the "reliability" of an unnecessarily suggestive identification merely by proof of an adequate opportunity to observe the criminal at the time of the crime, the police will have little incentive to employ the most reliable available identification procedure; they will know that virtually no identification need be excluded no matter how suggestive the atmosphere in which it took place. Pulaski, *Neil v. Biggers, supra,* 26 Stan. L. Rev. at 1120.

In addition to deterring improper police procedures and protecting defendants and the public at large from convictions based on evidence of questionable reliability, a strict exclusionary rule would make the courts' reviewing function substantially easier. Trial courts would no longer be required to hold complex hearings to assess the circumstances under which witnesses observed the commission of crimes and to evaluate psychological factors that can properly be interpreted, if at all, only after carefully structured scientific analysis. See Levine and Tapp, *The Psychology of Criminal Identification: The Gap From Wade To Kirby*, 121 U. Pa. L. Rev. 1079 (1973). Both trial and appellate courts will be able to focus their attention on facts less likely to be disputed – principally the identification procedures employed and the justifications for the suggestiveness of those procedures.

5. A strict exclusionary rule would interfere only minimally with effective law enforcement

On the other side of the ledger, there is little cost to law enforcement agencies in the adoption of a strict exclusionary rule. Such a rule would exclude only

evidence obtained in an improper proceeding. The "independent basis" test of *United States v. Wade, supra,* would still permit the prosecution to attempt to establish that the suggestive proceeding had not irremediably tainted a witness' ability to identify. The witness could then attempt an identification at a properly conducted lineup. Only if a witness were subjected to an unnecessarily suggestive identification *and* if he had had an inadequate opportunity to observe the criminal at the time of the crime would the prosecution be unable to make use of any later identification by that witness.

C. Mrs. Turman's testimony concerning her pretrial identification of petitioner should have been excluded as the product of a confrontation so suggestive "as to give rise to a very substantial likelihood of misidentification"

In section (A.) of this point we described the respects in which Mrs. Turman's pretrial confrontation with petitioner was impermissibly and unnecessarily suggestive. We show here that it was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States, supra,* 390 U.S. at 384. In *Neil v. Biggers, supra,* the Court summarized the factors to be examined in making this determination.

> "As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level

> of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." 409 U.S. at 199-200.

See *Simmons v. United States, supra,* 390 U.S. at 382-86.

The first factor identified in *Biggers* was the witness' opportunity to observe. In the case at bar, Mrs. Turman testified that her husband's murderer was in her presence for approximately ten minutes. The more significant question, however, is what she did with the opportunity or, as the Court phrased it in *Biggers,* her "degree of attention."

We know from Mrs. Turman's testimony that once the robber pointed a gun at her she was too frightened to look at him or to know what was happening, and that at one point she even covered her face with her hands and began to pray (A. 46). The record also suggests that Mrs. Turman did not pay close attention before the gun appeared. At trial she did not remember, for example, whether the robber walked around the store in front of her or behind her or, indeed, whether or not she accompanied him for part of his walk (R. 234-35). When she was asked questions about what acts not connected to the crime the robber performed while in the store, she could not remember (A. 42-43).

A third factor – the inaccuracy of Mrs. Turman's prior identification – is closely related to the first two questions. We have already described how Mrs. Turman's initial description of her husband's murderer deviated markedly from petitioner's actual appearance at the time of his automobile accident (*supra,* pp. 8-9). In addition to answering directly the question posed in *Biggers,* this initial description – when contrasted with her identification of petitioner five days later – suggests that, despite the opportunity she

may have had to observe the murderer, Mrs. Turman did not pay close attention to him. Finally, it bears mention that when questioned by a deputy sheriff an hour or two after the crimes, Mrs. Turman herself expressed doubt as to her ability to identify the criminal upon sight (A. 45-46).

In the face of these circumstances, Mrs. Turman's testimony that she was certain of the accuracy of her pretrial identification (A. 37) simply cannot be credited. See P. Wall, *supra,* at 15. This must surely be true in light of Mrs. Turman's comment as to the time when this certainty seized her: before she saw petitioner's face at the preliminary hearing, while he sat with his back to her in the courtroom.

The record demonstrates that the pretrial hearing during which Mrs. Turman identified petitioner was conducted in an atmosphere conducive to irreparable misidentification and that misidentification was, in fact, likely.[14] The record contains none of the indicia of reliability that the Court stressed in *Biggers* where, for example, the witness had established a history of reliability by resisting the opportunity to identify persons other than the defendant in properly conducted lineups. 409 U.S. at 201. Finally, the record here reveals no circumstances justifying failure to adhere to a constitutionally permissible identification procedure.

Accordingly, petitioner's conviction must be reversed.

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[14]Since petitioner's conviction must be reversed if Mrs. Turman's testimony as to her pretrial identification of petitioner was improperly admitted, *Neil v. Biggers, supra,* 409 U.S. at 198 n. 5, we need not separately consider the reliability of Mrs. Turman's courtroom identification. See *Sanchell v. Parratt, supra,* 530 F.2d at 296.

III.

THE TRIAL COURT'S ADMISSION IN EVIDENCE OF PHILLIP ARNOLD'S IN-COURT IDENTIFICATION OF PETITIONER DEPRIVED HIM OF DUE PROCESS OF LAW

The trial court's failure to suppress Phillip Arnold's in-court identification of petitioner also requires reversal.

Arnold, as we have described, while still in the hospital recovering from his bullet wounds, selected a photograph of petitioner from among six shown him by sheriff's deputies. He was not permitted to testify to that pretrial identification at the trial, but was allowed to tell the jury that he recognized petitioner as his assailant (A. 96-97).[15] The evidence is substantial that this in-court identification had its genesis in the impermissibly and needlessly suggestive photo spread rather than in Arnold's recollection of the crime itself.

As we have said, when Arnold was shown the group of six photographs in the hospital, he immediately rejected four of them because "they didn't look anything at all like him [petitioner]" (A. 78). Of the two remaining, he chose the picture of petitioner, so he explained, because the other was "also younger, and wasn't as big" (A. 83). Surely, however, the burden of his task was also substantially mitigated by the presence on petitioner's photo of his name and the date of his arrest, for Arnold testified out of the hearing of the jury that he had, by the time of the photo display,

[15]The trial court suppressed Arnold's testimony concerning the photo display, without explanation, after extensive argument focusing on suggestiveness. (A. 95)

already read newspaper stories about the crime and the arrest that had occurred (A. 76, 78-80, 89-90).[16]

In *Simmons*, this Court explained the dangers of suggestive photographic identifications.

> It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. . . . This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, *or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized.* The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. *Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification.*" 390 U.S. at 383-84 (emphasis supplied).

See also P. Wall, *supra*, at 81.

The fears the Court expressed in *Simmons* describe precisely what happened in the case at bar. Arnold had only a brief opportunity – 20 to 25 seconds by his own testimony – to observe his assailant, and for much

[16]The testimony of deputy sheriff Neil is also significant. He testified, first, that Arnold identified the photograph in writing by copying the arrest date (A. 89) and, second, that only one or two photographs other than petitioner's had a name on it (A. 90).

of that time his attention was focused on the prostrate Mr. Turman. Arnold also testified that his mind "went blank" for some period after he saw the gun (A. 69, 102). We have already shown that of the two photographs that petitioner did not immediately eliminate the written markings emphasized one – petitioner's.

These facts all point to the conclusion that Arnold's at-trial identification of petitioner was the product of the pretrial photographic identification and not of an independent recollection of the assailant's appearance during the commission of the crime. Moreover, just as the prosecution need not have had Mrs. Turman identify petitioner in a suggestive context, it also need not have done so with Arnold. At the time of Arnold's pretrial identification of petitioner the police had already settled upon him as Mr. Turman's murderer and were pursuing no other leads. The prosecution could have taken more time, if more time was necessary, to gather photographs of other persons bearing a resemblance to petitioner and could also easily have waited until Arnold was released from the hospital and then conducted a proper line-up.

The prosecution's attempt to carry its burden of demonstrating that Arnold's trial identification of petitioner was independent of and not tainted by the display of photographs he had seen, see *Sanchell v. Parratt, supra,* 530 F.2d at 296, falls far short of the requirements established by this Court. As Arnold's direct examination demonstrates, the prosecutor led him through a series of *pro forma* statements that were no more than a gesture of compliance with the law:

> "Q. All right, Mr. Arnold, I want you to look at this man and tell me whether or not you can identify him from the time you saw him

> when he blasted you in the face? Can you, think back to September 8th, 1973, forget anything else, forget the hospital, forget everything, September 8th and right now?
> A: Yes, sir, that's him.
> Q: Do you have any doubt whatsoever in your mind?
> A: No, sir, none.
> Q: Did the photographs – Are you remembering the photographs?
> A: No, Sir.
> Q: What are you remembering?
> A: The day I was shot.
> Q: Are the photographs helping you in any way?
> A: No, sir.
> Q: Whatsoever to identify him?
> A: No, sir.
> Q: None whatsoever in your mind?
> A: None." (A. 83)

Given the fleeting opportunity that Arnold had to observe his assailant and the lapse of some five months between the date of the crime and that of the trial, more must be demanded of the prosecution than the ritualistic testimony of the witness, in response to leading questions, to establish that the courtroom identification is predicated upon a memory of the original observation of the criminal rather than a recollection of the gratuitously suggestive photo spread. Without a meaningful showing of independent memory,

> "it becomes simply a matter of judicial rhetoric to say that the earlier denial of due process is no longer influential in the witness' ultimate identification. Due process, under these circumstances, and the test of substantial likelihood of irreparable misidentification are more than mere subjective tools of the judge viewing the facts. Such tests

necessarily must lend themselves to objective evaluation and the assurance necessary to overcome the pervasive dangers of misidentification." *Sanchell v. Parratt, supra,* 530 F.2d at 296-97.

In the absence of any meaningful attempt by the prosecution to show that Arnold's at-trial identification of petitioner was independent of the photo identification, the trial court's refusal to prohibit Arnold's in-court identification requires that petitioner's conviction be reversed.

IV.

THE EXCLUSION OF PROSPECTIVE JURORS FROM THE VENIRE BECAUSE OF THEIR EXPRESSED GENERAL OPPOSITION TO CAPITAL PUNISHMENT VIOLATED PETITIONER'S RIGHTS UNDER *WITHERSPOON V. ILLINOIS*

Pursuant to Fla. Stat. Ann. §921.141(3) (1974-1975 supp.), it is the jury's duty in capital cases to recommend, by majority vote, a sentence of either death or life imprisonment; the trial judge is empowered to accept or reject the jury's recommendation. Although advisory, the jury's recommendation remains highly important to a convicted capital defendant, for the Florida Supreme Court has said that:

> "[b]oth the trial judge, before imposing a sentence, and this Court, when reviewing the propriety of the death sentence, consider as a factor the advisory opinion of the sentencing jury. In some instances it could be a critical factor in determining whether or not the death penalty should be imposed."

LeMadline v. State, 303 So.2d 17, 20 (Fla. 1974). *See also Taylor v. State,* 294 So.2d 648 (Fla. 1974).

In the present case, the trial court excluded five prospective jurors for cause on the basis of their expressed convictions concerning the death penalty (A. 17-23). Petitioner submits that at least two of these exclusions were patently erroneous under *Witherspoon v. Illinois, supra,* and that his death sentence must therefore be vacated. *Davis v. Georgia,* 45 U.S.L.W. 3414 (December 6, 1976).

Venireman Varney was excluded after the following colloquy:

> "THE COURT: [D]o you hold such conscientious moral or religious principles in opposition to the death penalty you would be unwilling under any circumstances to recommend the death sentence?
>
> * * *
>
> MR. VARNEY: Yes, sir.
>
> THE COURT: You feel then, sir, that even though and I am not saying it will it would [sic] be purely speculative, in the event that the evidence should be such that under the law that should be the legal recommendation you would be unwilling to return such a recommendation because of your conscientious beliefs?
>
> MR. VARNEY: I believe I would.
>
> THE COURT: All right, sir. You will be excused." (A. 18).

Venireman Murphy was excluded on the basis of an even more perfunctory exchange:

> "THE COURT: Do you have any moral or religious, conscientious morals or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?

MR. MURPHY: Yes, I have.

THE COURT: All right, sir, you will be excused then." (A. 22-23)

Witherspoon prohibits the exclusion of veniremen for cause on account of conscientious or religious scruples against the death penalty[17] except under narrow and carefully defined circumstances. Such exclusions are constitutionally permissible only if veniremen make

> "unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*." *Witherspoon v. Illinois, supra,* 391 U.S. at 522-23 n. 21 (emphasis in original).

See also, Maxwell v. Bishop, 398 U.S. 262, 266 (1970); *Boulden v. Holman,* 394 U.S. 478, 482 (1969); *Mathis v. New Jersey,* and companion cases, 403 U.S. 946-48 (1971); *Marion v. Beto,* 434 F.2d 29, 32 (5th Cir. 1970).

Mr. Varney's responses to the court's questions concerning the extent and effect of his views on capital punishment fell far short of the *Witherspoon* requirements. He said only that "I believe I would" be "unwilling" to return a recommendation that the death penalty be inflicted. This response hardly demonstrated

---

[17]"[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Witherspoon v. Illinois, supra,* 391 U.S. at 522 (footnote omitted).

"unambiguously," 391 U.S. at 516 n.9, or "unmistakably," 391 U.S. at 522 n.21, that Mr. Varney would "automatically" have voted against the imposition of the death penalty; it did not even begin to suggest that his views on capital punishment would have prevented him from making an impartial decision as to petitioner's guilt. He expressed only a tentative belief that he would be unwilling to return a death sentence, a position that is far less certain than *Witherspoon* requires for exclusion.

Mr. Murphy's response to the court's questioning was equally uninformative. His response established no more than that a vote to recommend the death penalty would violate certain abstract principles. Without explaining its reasoning, the trial court inferred from this that, regardless of what the evidence showed, Mr. Murphy would inevitably and automatically vote to prevent imposition of the death penalty.

The state apparently concedes that the colloquy between the trial court and Mr. Murphy was insufficient to comply with the standards set forth in *Witherspoon,* and argues instead that Mr. Murphy's exclusion was proper because "his answer was given in response to not only [the one question he was asked] but all others similar to it" that were put to other prospective jurors (Response to petition for certiorari, p. 16). We submit, however, that this Court has apparently already rejected this argument. *Alexander v. Henderson,* 409 U.S. 1032, *rev'g* 459 F.2d 1391 (5th Cir. 1972); *Harris v. Texas,* 403 U.S. 947 (1971) (*per curiam*), *rev'g* 457 S.W.2d 903 (Tex. Cr. App. 1970); *Adams v. Washington,* 403 U.S. 947 (1971) (*per curiam*), *rev'g* 458 P.2d 558 (Wash. 1969); *Segura v. Patterson,* 403 U.S. 946 (1971), *rev'g* 402 F.2d 249 (10th Cir. 1969). *See also, Townsend v. Twomey,* 452 F.2d 350 (7th Cir.), *cert. denied,* 409 U.S. 854 (1972); *Hackathorn v. Decker,* 438 F.2d 1363 (5th Cir. 1971).

Moreover, in light of *Witherspoon*'s requirement that the demonstration of the witness' opposition to capital punishment be "unambiguous" and "unmistakable," 391 U.S. at 516 n. 9, 522 n. 21, the state's position cannot prevail. Unless each juror is examined individually as to his or her own views, it is impossible to know with sufficient certainty what those views are.

Seemingly, the court did not conclude that either Mr. Varney or Mr. Murphy would be unable to sit impartially on the question of guilt or innocence. Neither venireman expressed any judgment whatever concerning the impact of his attitude toward capital punishment on his consideration of the evidence of petitioner's guilt; indeed, the court failed to inquire of either of them on this subject. Their silence was especially important, since the court did not explain to either of them their responsibilities as jurors to obey the court's instructions on the law or the meaning of the relevant concept of "impartiality."

The responses of these veniremen are indistinguishable in substance from similar expressions of sentiment by jurors whose exclusion for cause this Court has heretofore found erroneous. See *Witherspoon v. Illinois, supra,* 391 U.S. at 515-16 n. 9. For example, in *Maxwell v. Bishop, supra,* 398 U.S. at 265 (emphasis omitted), the following colloquy took place:

> "Q. Mr. Adams, do you have any feeling concerning capital punishment that would prevent you or make you have any feelings about returning a death sentence if you felt beyond a reasonable doubt that the defendant was guilty and that his crime was so bad as to merit the death sentence?
>
> A. No, I don't believe in capital punishment."

Supra, 394 U.S. at 483-84. The law is clear. Although "a mere reluctance . . . or an abstract belief against capital

punishment is not sufficient grounds for challenging a juror for cause," *Smith v. Whisman,* 431 F.2d 1051, 1052 (5th Cir. 1970), both Mr. Varney and Mr. Murphy were excused upon nothing more.

The trial court's questioning was, indeed, calculated to confuse the prospective jurors as to their duty under the new Florida statute. Although they were instructed that they would have the dual role of considering guilt and sentence separately, they were not asked whether their scruples would interfere with the determination of petitioner's guilt under a procedure in which a guilty verdict does not necessarily entail the death sentence. They were not advised during *voir dire* of the wide range of mitigating circumstances that jurors would be entitled to recognize in making a recommendation against death (A. 15-17). See Fla. Stat. Ann. §921.141(7) (1974-1975 supp.). Had they been properly instructed, the court might well have found that their scruples did not disqualify them from sitting on the jury.

Moreover, we submit that a disqualifying opposition to capital punishment cannot be made "unmistakably clear," as required by *Witherspoon v. Illinois, supra,* 391 U.S. at 522 n. 21, in the absence of an instruction by the trial court that it is the civic duty of each venireman to sit as a juror and to follow the law of the state if he or she can. As the court declared in *Boulden v. Holman, supra,* 394 U.S. at 483-84:

> "[I]t is entirely possible that a person who has 'a fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law – to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case."

A venireman should therefore be instructed, at the very least, that the law requires him to "subordinate his personal views to what he perceive[s] to be his duty to abide by his oath as a juror and to obey the law of the State." *Witherspoon v. Illinois, supra,* 391 U.S. at 514-15 n. 7. Without such an instruction the statements of Mr. Varney and Mr. Murphy fall far short of establishing that they were either unwilling or unable to subordinate their feelings to the law of Florida, which the trial court would charge them to obey.

The state, in its response to our petition for certiorari, argued that *Witherspoon* was inapplicable because under Florida law the jury's role in sentencing is advisory only. In addition to being inconsistent with *Witherspoon,*[18] that argument proves too much. If the jury has no significant responsibility in sentencing, then the state has no right to exclude prospective jurors because of their opposition to the death penalty without showing that the veniremen excluded would be unable to sit objectively on the question of guilt or innocence. The state apparently admits that no such showing was made in the case at bar (Response to petition, p. 17).

If the Court does not reverse petitioner's conviction upon any of the grounds set forth in the earlier points in our argument, it should vacate petitioner's death sentence because of the trial court's failure to adhere to the requirements of *Witherspoon v. Illinois.*

[18] *Witherspoon* held explicitly that its rules were applicable to procedures under which juries "imposed or recommended" the death penalty. 391 U.S. at 522.

CONCLUSION

The decision and judgment of the Supreme Court of Florida affirming petitioner's conviction and sentence of death must be reversed upon one or more of the grounds urged above and the case remanded to the Florida courts for retrial.

Respectfully submitted,

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Dated: December 15, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5382

WILLIE JASPER DARDEN,

Petitioner,

against

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

All references to the Appendix will be made by the use of the prefix "A" followed by the appropriate page number.

References to the original transcript of trial testimony will be made by use of the symbol "R" followed by the appropriate page number.

Pursuant to Rule 40, Rules of the United States Supreme Court, respondent will not include in this brief: (1) references to the official report of the court below; (2) a jurisdictional statement; or (3) a reference to statutes involved in the case.

QUESTION PRESENTED

As phrased in this Court's order of January 10, 1977, the question is: Whether the prosecutor's summation to the jury in the circumstances of this case deprived petitioner of due process of law.

STATEMENT OF THE CASE

On the evening of September 8, 1973, Mrs. Helen Turman was present in her furniture store located in Lakeland, Florida (A-24; R-Vol.IV, p. 202). She was alone (A-24). Some time between 5:00 p.m. and 6:00 p.m., Mrs. Turman opened the *back door* of the store and confronted petitioner. He told her that he wanted to look at approximately $600.00 worth of furniture for some furnished apartments (A-24). Mrs. Turman showed him some couches and bedding (A-25). Apparently petitioner then departed the store, telling Mrs. Turman that his wife would be back, presumably to inspect the same items he had been shown (A-26). Petitioner then returned and asked to see some ranges and stoves (A-26). Mrs.

Turman complied with his request, and in response to an inquiry of price, she started toward her adding machine (A-26). At that point, petitioner grabbed Mrs. Turman's right arm, stuck a gun in her back, and told her to, "Do as I say and you won't get hurt." (A-26). Petitioner then pulled down a loading door and told Mrs. Turman to fasten the glass sliding door through which he entered and not to try anything funny (A-26). He then took Mrs. Turman to the cash register and told her to open it (A-26). After she did this, she was told to back up against a refrigerator. Petitioner then emptied the cash register of all bills, the amount of which was not more than $15.00 (A-27). Petitioner then told Mrs. Turman to proceed toward the back of the store. At that time, Mrs. Turman was getting

weak in the knees and thought she was going to fall (A-27). Petitioner ordered her to stand up and keep going (A-27). The pair proceeded to the back of the store where some box springs and mattresses were stacked against the wall (A-27). At that moment, Mrs. Turman's husband appeared at the back door, was warned by his wife not to come in, and was immediately shot between the eyes (A-27,28). Petitioner then stepped in front of Mrs. Turman, pointed the gun at her, and ordered her to "Stand still, don't move." (A-28). While holding the gun on Mrs. Turman, petitioner went over to her husband's body and pulled it halfway into the building (A-28). Petitioner then attempted to close the door, but was unable since one of Mr. Turman's feet was in the way (A-28). He then returned to Mrs.

Turman and told her to get down on the floor (A-28). She sat down on the floor, approximately four to five feet from her dead or dying husband (A-29). As he was unzipping his pants and undoing his belt buckle, petitioner told Mrs. Turman to take her teeth out and suck his penis (A-29). Mrs. Turman cried, "Lord, have mercy." (A-29). Again, she cried, "Lord, have mercy,", and thereupon, petitioner told her to get up (A-29). As petitioner was taking Mrs. Turman back toward the front of the store, a neighbor and part-time employee, Phillip Arnold, shoved the back door open (A-29). Mrs. Turman screamed to Phillip Arnold to go back (A-30).

As Phillip Arnold arrived at the back door, he could see Mr. Turman's body lying partially in the store (A-66). Mr.

Turman was bleeding "real bad" from the forehead (A-66). Although he heard Mrs. Turman's warning, Phillip Arnold did not know what she meant (A-67). He observed Mrs. Turman and petitioner in the store and asked petitioner to help him move Mr. Turman out of the rain (A-67). Petitioner replied, "Sure, buddy, I'll help you." (A-67,68). Phillip Arnold then squatted over the body, and as he looked up, petitioner was standing over him with a gun in his face (A-67). Petitioner then pulled the trigger, and the gun "clicked." (A-69). Petitioner pulled the trigger again and shot Phillip Arnold in the mouth (A-69). Phillip Arnold then started to run away from the store, and petitioner shot him in the neck (A-69). While still running away from the store, Phillip Arnold was shot

yet a third time in the side (A-69). Petitioner then left the store.

Evidence of petitioner wrecking his automobile is properly stated in his brief. Respondent accepts that statement relative to the accident, with the additional comment that the probable murder weapon was found 39 feet from the scene of that accident. While it is true that expert testimony could not conclusively show that the gun found was the same one used, it was nonetheless shown that the recovered weapon was a .38 caliber revolver which had been modified to use .38 special cartridges (R-Vol.V, p. 346). Because of this modification, it was impossible to scientifically prove that the bullets recovered were fired from that gun. Additionally, the gun had a misaligned cylinder so that when fired, a portion of

the bullet would be shaved (R-Vol.V, p. 349). However, evidence did show that the cartridges, both live and spent, found in the gun were arranged and situated so that if someone had taken the gun and reconstructed the shots at the killing, the hammer-to-bullet relationship would be (and was) identical (R-Vol.IV, pp. 521, 522,537,542).

SUMMARY OF THE ARGUMENT

Since the issue of the prosecutor's closing argument was not presented as a federal question to the Florida Supreme Court, this Court is without jurisdiction. By failing to properly object to the closing arguments, petitioner waived any right to claim error. Even if this issue were properly preserved and presented, the particular remarks

alleged as objectionable by petitioner were not sufficiently prejudicial to deprive him of his constitutional right to either a fair trial or due process of law.

ARGUMENT

THE JUDGMENT IS NOT INVALID ON THE GROUNDS THAT THE PROSECUTOR'S CLOSING ARGUMENT WAS INFLAMMATORY AND PREJUDICIAL.

Petitioner claims that he was deprived of his federal constitutional right to a fair trial because of the closing arguments presented by the prosecutor.

We begin with the observation that this issue has not been postured in terms of federally protected rights until here and now in this Court. Neither at trial nor on direct appeal to the Florida Supreme Court did petitioner claim that the remarks contained in the closing arguments violated his federal constitutional right to a fair trial. Indeed, in his appearance before that tribunal, petitioner presented the Florida Supreme

Court with argument which discussed and was directed only to an alleged violation of settled Florida state law.

Accordingly, as is obvious by its decision, the Florida Supreme Court decided the issue by principles established under Florida law. Notably, in addition to holding that the remarks did not deprive petitioner of a fair trial, the Florida Supreme Court utilized well-established state law that in the absence of an objection to a prosecutor's argument appellate review of that argument will not be had, citing *State v. Jones*, 204 So.2d 515 (Fla. 1967). The Florida Supreme Court did nothing more than courts in several other jurisdictions have done regarding the issue of closing argument. See, e.g., *People v. Jordan*, 172 N.W.2d 495 (Mich.App. 1969); *People*

v. Brosman, 298 N.E.2d 78 (N.Y. 1973); *People v. Prim*, 289 N.E.2d 601 (Ill. 1972), *cert. den.*, 412 U.S. 918; *People v. Jennings*, 296 N.E.2d 19 (Ill.App. 1973); *People v. Hill*, 240 N.E.2d 801 (Ill.App. 1968), *cert. den.*, 395 U.S. 984; *People v. Modesto*, 427 P.2d 788 (Calif. 1967), *cert. den.*, 389 U.S. 1009; *Schneider v. State*, 501 P.2d 868 (Okla.App. 1972); *Thames v. State*, 453 S.W.2d 495 (Tex.App. 1970); *Mitchell v. State*, 277 So.2d 395 (Ala.App. 1973); *State v. Cuchinelli*, 261 So.2d 217 (La. 1972); *Myers v. State*, 268 So.2d 353 (Miss. 1972).

Consequently, respondent submits that although the issue was decided below, it was disposed of on state grounds and not in consideration of the federal constitution. Respondent therefore submits that since the federal question was neither

raised nor decided in the court below, this Court lacks the jurisdiction to review the matter. *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

Alternatively, even if the Court were to consider that the federal question was properly raised and decided below, respondent quickly points out, as was observed by the Florida Supreme Court, that the record is void of a specific objection to the arguments of the prosecutor, at least on the basis of prejudicial or inflammatory substance.

The two instances in which petitioner made "objections" during the closing argument of the prosecutor appear in the record thusly:

> "This sponsor, otherwise his girl friend, knew that he was a criminal--prisoner, I'm sorry, prisoner; knew, let him bring the gun into her house while he was on weekend furloughs.
>
> "MR. GOODWILL: Now, I object. There's been no testimony of this.
>
> "MR. McDANIEL: I'm sorry, I believe Mr. Darden testified to it.
>
> "MR. GOODWILL: I don't believe so.
>
> "THE COURT: The jury are the judges of the evidence. As I told you before, ladies and gentlemen, you are the sole judges. Your memory of the evidence is what counts. Proceed, sir." A-122

Obviously, this objection was directed to a statement which petitioner alleged was without testimonial basis; an instruction followed.

The second instance in which petitioner's counsel objected appears as follows:

> "MR. MALONEY: Your Honor, that's about the fifth time that he has commented he wished someone would shoot this man or that he would kill himself. I wish the Court would instruct Mr. McDaniel to stick with what little evidence he has.

"MR. McDANIEL: You don't have any evidence yourself, Mr. Maloney.

"THE COURT: All right, gentlemen. Proceed with your argument. Objection will be overruled. Go ahead, sir." A-136

It is interesting that this statement is not in the form of an objection on the grounds of inflammatory or prejudicial remarks, but rather it is an expressed desire that the trial court instruct the prosecutor to confine his remarks to the evidence.

Accordingly, respondent submits that if constitutional error occurred it was waived by petitioner's failure to timely object. *Estelle v. Williams*, __U.S.__, 48 L.Ed.2d 126 (1976).

In *Estelle, supra*, the petitioner alleged that he was unlawfully convicted in that he was tried in prison clothing. Neither petitioner nor his attorney objec-

ted in the trial court. On appeal the Texas Court of Criminal Appeals affirmed the conviction. Williams then sought habeas corpus relief in the federal district court claiming he was denied a fair trial. The district court agreed that to try petitioner in prison garb was inherently unfair but that the error was harmless. The United States Court of Appeals, Fifth Circuit, reversed the district judge's holding that the error was harmless and ordered that the writ should issue. This Court granted a writ of certiorari and reversed the Court of Appeals. Justice Burger, speaking for six members of the Court (Justice Stevens did not participate), held Williams was not entitled to habeas corpus relief because he did not timely object to being tried in prison clothes. The Court said:

* * *

"Nothing in this record, therefore, warrants a conclusion that respondent was compelled to stand trial in jail garb or that there was sufficient reason to excuse the failure to raise the issue before trial.[9] Nor can the trial judge be faulted for not asking the respondent or his counsel whether he was deliberately going to trial in jail clothes. To impose this requirement suggests that the trial judge operates under the same burden here as he would in the situation in *Johnson v. Zerbst*, 304 U.S. 458 (1938), where the issue concerned whether the accused willingly stood trial without the benefit of counsel. *Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system.*

"Accordingly, although the State cannot, consistent with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes, *the failure*

to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation.

"[9]It is not necessary, if indeed it were possible, for us to decide whether this was a defense tactic or *simply indifference* . . . ." 48 L.Ed.2d at 135 (emphasis added)

Mr. Justice Powell in his concurring opinion said:

* * *

"As relevant to this case, there are two situations in which a conviction should be left standing despite the claimed infringement of a constitutional right. The first situation arises when it can be shown that the substantive right in question was consensually relinquished. The other situation arises when a defendant has made an 'inexcusable procedural default' in failing to object at a time when a substantive right could have been protected. Hart, Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 118 (1959); see ABA Project on Minimum Standards for Criminal Justice, Standards

Relating to Post-Conviction Remedies at 35-36.

"Williams was represented by retained, experienced counsel. It is conceded that his counsel was fully aware of the 'prison garb' issue and elected to raise no objection simply because he thought objection would be futile. The record also shows that the state judge who presided at Williams' trial 'had a practice of allowing defendants to stand trial in civilian clothing, if requested. . . .' 346 F.Supp., at 343. It thus is apparent that had an objection been interposed by Williams to trial in prison garb, the issue here presented would not have arisen.

"This case thus presents a situation that occurs frequently during a criminal trial--namely, a defendant's failing to object to an incident of trial that implicates a constitutional right. As is often the case in such situations, a timely objection would have allowed its cure. As is also frequently the case with such trial-type rights as that involved here, counsel's failure to object in itself is susceptible to interpretation as a tactical choice. *Ante*, at 7.

It is my view that a tactical

choice or procedural default of the nature of that involved here ordinarily should operate, as a matter of federal law, to preclude the later raising of the substantive right. We generally disfavor inferred waivers of constitutional rights. See *Johnson v. Zerbst, supra*, at 464; 525-526 (1972). *That policy, however, need not be carried to the length of allowing counsel for a defendant deliberately to forego objection to a curable trial defect, even though he is aware of the factual and legal basis for an objection, simply because he thought objection would be futile."* 48 L.Ed.2d at 136-137. (emphasis added).

In *Francis v. Henderson*, __U.S.__, 48 L.Ed.2d 149 (1976), decided on the same day as *Estelle, supra*, this Court denied habeas corpus relief where petitioner alleged that Negroes were systematically excluded from the grand and petit jury but did not move to quash prior to trial as required by state law. This Court noted that to allow a claim to

be raised belatedly:

> "'. . . *would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult . . . .*'" (emphasis added)
> 48 L.Ed.2d at 153

In *State v. Jones, supra,* the Florida Supreme Court, in requiring a timely objection, made the identical observation, saying:

> ". . . This [failure to object] made it possible for defense counsel to stand mute if he chose to do so, knowing all the while that a verdict against his client was thus tainted and could not stand. By such action defendants had nothing to lose and all to gain, for if the verdict be 'not guilty' it remained unassailable."
> 204 So.2d at 518

Respondent considers the above principle as the fundamental concept of appellate review. Paraphrased, it stands for

the proposition that if basic rights are to be safeguarded, alleged violations of those rights *must* be raised. It is this requirement which constitutes the defendant's obligation in the total scheme of fairness. Undoubtedly, it is the very basic function of the adversary system. Had petitioner objected on the basis of inflammatory argument, he would have afforded the trial court the opportunity to appropriately instruct the jury or do whatever was indicated. By failing to pointedly object at the earliest moment he considered the remarks to be inflammatory, petitioner prohibited any curative instructions.

Interestingly, some of the cases upon which petitioner relies indicate that at the time improper argument was made some form of an objection was made by the

defendant. In *Frazier v. Cupp*, 394 U.S. 731 (1969), for example, a mistrial was requested. In *Berger v. United States*, 295 U.S. 78 (1935), a proper objection was raised. The one case upon which petitioner relies and in which no objection was made is *Malley v. Connecticut*, 414 F.Supp. 1115 (1976). There, the district court specifically referred to the failure to object but opined that it would still review the issue since the Connecticut Supreme Court did address the constitutional claim on the merits. Such is not the case here.

Petitioner fully recognizes his failure to object but states that even if he had objected and even if curative instructions were given, they could not have undone the irreparable damage. He also acknowledges the trial court's

preliminary instructions relative to the purpose of closing arguments (A-103-104), (R-Vol.III, p. 186), but claims that nothing whatsoever could have eliminated the prejudicial effect on the jury. In other words, petitioner is saying that regardless of the preliminary instructions, and regardless of the intelligence of the jury, a verdict of guilty could have been returned *solely* on the strength of the closing arguments.

In support of his claim, petitioner has dissected the arguments into three specific areas of alleged wrongdoing and one general area designed as a catch-all for all other "improper forms of argument." Relying on less than applicable case authority, he tells of the many things the arguments constituted; however, after examining that authority, it becomes

clear what the arguments, in fact, were not.

For example, the remarks were not a misstatement of law and fact, *Bruce v. Estelle*, 483 F.2d 1031 (5th Cir. 1973). They were not structured so as to evoke racial bias, *United States ex rel. Haynes v. McKendrick*, 481 F.2d 152 (2d Cir. 1973). They were not indicative of evidence known to the prosecutor but not to the jury, *Hall v. United States*, 419 F.2d 582 (5th Cir. 1969); *Dunn v. United States*, 307 F.2d 883 (5th Cir. 1962). They were not an expression of personal belief based on the prosecutor's specialized training, *Greenburg v. United States*, 280 F.2d 472 (1st Cir. 1960). They were not an expression expecting future prosecution for crimes, *Manning v. Jarnigan*, 501 F.2d 408 (6th Cir. 1974).

The only conceivable portion of the closing arguments to which petitioner's citations might apply is that reflected in prosecutor White's remarks:

> "I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life." A-120

We dispute that the above-quoted remark resulted in the alleged harm. We dispute that a prosecutor's expression of personal belief in guilt, *without more*, is a *per se* violation of a federally protected right. It is one thing for the prosecutor to create the impression that due to his vast experience and training he believes a defendant guilty, *Greenburg v. United States, supra*. It is one thing for him to base his belief on evidence

not known to the jury, *Pointer v. Texas*, 380 U.S. 400 (1965) (violation of right to confrontation); but it is entirely a different matter when a prosecutor summarizes the evidence and then, relying on that evidence, tells a jury he is convinced of guilt. Such an innocuous remark does no violence to the federal constitution. *Cf. Lawn v. United States*, 355 U.S. 339 (1958). It constitutes nothing more than an expression of what the prosecutor believes the evidence has shown; it is exactly the same as a defense lawyer expressing his belief as to what it has not shown.

Based on its understanding of the issue, respondent contends that a closing argument is constitutionally improper and denies due process when it is:

(1) inflammatory[1]; (2) prejudicial; and (3) not supported by evidence presented to the jury.

We submit that all these factors must be present since an argument may be inflammatory but not prejudicial; it may be inflammatory and prejudicial but based on evidence; it may be prejudicial and

---

[1]Webster's definition of inflammatory is:

"inflammatory . . .
1: tending to inflame or excite the senses 2: tending to excite anger, animosity, disorder, or tumult: SEDITIOUS . . ." Webster's *Third New International Dictionary*, 1966 at 1159

He defines "inflame" as:

"inflame . . .
2: to excite (as passion or appetite) to an excessive or unnatural action or heat: INTENSITY, ROUSE . . . 3a: to provoke to anger or rage: EXASPERATE, IRRITATE, INCENSE, ENRAGE . . ." Webster, *supra*, at 1159

based on evidence but not inflammatory (indeed, all prosecutions are designed to be prejudicial to all defendants); it may be inflammatory and based on evidence but not prejudicial; and it may be unsupported by evidence but neither prejudicial nor inflammatory.

Underlying all of the above factors is the obvious requirement that the argument be at least relevant to the business at hand.

It is this test which, when measured in terms of the narrow standard of due process, must be applied in order to determine whether petitioner was deprived of a fair trial. Remembering that he who claims unfairness must show it in terms of demonstrable reality and not as the result of speculation, *Buchalter v. New York*, 319 U.S. 427 (1943), let us

examine the specific allegations of constitutional error.

Regarding McDaniel's remarks which expressed the rather obvious desire to prosecute the Division of Corrections, petitioner claims that they have no rational relationship to the question of guilt or innocence. With that contention respondent could not more heartily agree; they bore no relationship to the question whatsoever. That the remarks were utterly irrelevant is cheerfully conceded. However, were they prejudicial? How could the prosecutor's personal contempt for the Division of Corrections *a priori* have affected the determination of whether petitioner was guilty or innocent? Indeed, the statements could just as easily have inured to petitioner's benefit since they tended to shift blame for the crimes on

someone else. It is entirely possible that defense counsel realized this and by not objecting, hoped that the impression of transferred culpability would remain with the jury. The prosecutor was neither demanding nor inviting the jury to return a guilty verdict in order to either strike a blow or otherwise "get at" the persons responsible for petitioner's furlough. He did not tell the jury that by convicting petitioner they could punish his keepers. Such does not logically follow and is therefore a far different situation than found in *Malley v. Connecticut, supra*. At best, these particular remarks did more harm to the prosecutor's image than to petitioner's rights. Surely, the individual character profiles of the jury (R-Vol.III, pp 3-176) demonstrated that those people were

intelligent enough to pay little or no attention to the prosecutor's comments relating to this matter. Moreover, the jury was specifically instructed that arguments of counsel were not evidence (A-103-104; R-Vol.III p. 186).

Of significant importance is the additional factor that in responding to McDaniel's remarks, defense counsel clearly neutralized any improper effect thusly:

> "MR. GOODWILL: . . . Mr. McDaniel got up here and he really didn't talk too much evidence he talked about how horrible it was and all of this. Then he proceeded to try the Division of Corrections. He tries Mr. Darden's girl friend who, by the way, the State could have also produced, she was along on that trip. He tries Mr. Maloney, and I think he was getting awfully close to trying me.
>
> "Well, we're only in this courtroom for one purpose, and that is to try the guilt or innocence of this man sitting at this table. What the Division of Corrections

> may or may not do or what I agree or disagree with their policies, or whether Mr. McDaniel agrees or disagrees with their policies, *we're not here for that*. You do that another time if that's an important issue." A-143 (emphasis added)

Obviously therefore, if, as petitioner contends, the jury was naive enough to have been improperly influenced by McDaniel then it was equally receptive to rehabilitation by Goodwill. We, of course, submit that the jury was sophisticated enough to have already known what defense counsel told them.

Petitioner has little use for McDaniel's statement to the effect that the only way to have kept petitioner from once again being loose in public was to convict him. While this remark may be troublesome at first glance, the circumstances demonstrate that it was not fatal to the

cause. Defense counsel Maloney, in the first closing argument the jury heard, repeatedly told the jury that the state, based on evidence it presented, essentially was asking the jury to kill his client (A-105,112,115).

In response to that, McDaniel corrected Maloney and properly told the jury that at that stage in the proceedings, the jury was to determine innocence or guilt and nothing else (A-122). He then elaborated on the function and scope of the advisory hearing. It was at this point that he made the remarks about which petitioner complains. In proper context, the statements appear thusly:

> "MR. McDANIEL: . . . Some of the remarks I heard in the opening argument by Mr. Maloney that I want to remember I disagree with, with his interpretation of the law. You take the law from the Judge. He

said that we are asking you to kill this man on this evidence.

"Well, he is wrong, of course. I think he knows he is wrong. The Court will tell you at the end of the argument in the Jury instructions at this point, *you are merely to determine his innocence or guilt, nothing else, whether he is guilty or innocent.* And after you return that verdict of guilty of first degree murder, robbery, and assault with intent to commit murder, the Court will impose a sentence on Count No. 2 and 3, which is robbery and assault with intent to murder, and then you will be asked at that time to go back and retire and advise the Court whether or not he gets the death sentence or whether he should get life.

"That is an advisory opinion on your part, and it has nothing to do with this trial, and Mr. Maloney knows that. But I am sure that I want you to remember Mr. Maloney's opening statement, opening argument when he called this person an animal. Remember that, because I will guarantee you I will ask for the death. There is no question about it.

"The second part of the trial I will request that you impose

the death penalty. I will ask you to advise the Court to give him death. That's the only way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it. It's the only way that anybody can be sure of it now, because the people that turned him loose--this man served his time and if this man served his time as the Court has sentenced him, that's fine. If he's rehabilitated, fine. But let him go home on furloughs, weekend passes--not home, strike that, excuse me--go over with his girl friend for the weekend, go shoot pool for the weekend, go sell his guns, or gun, for the weekend, go consume drink in the bars over the weekend." A-122-123 (emphasis added)

Accordingly, these particular remarks were in response to those made by the defense. *Lawn v. United States, supra.* They were necessary to correct the misstatement of the jury's function.

To that portion of petitioner's argument alleging an improper appeal to the jurors' emotions, we respond that the

only element of impropriety was its inflammatory nature. The only thing one can conclude by examining these remarks is that the prosecutor espoused some sort of a notion of "instant justice." That he wished petitioner had been instantly killed, by whatever means, cannot be denied. *But* did he prejudice the jury's determination of guilt? He did not invite the jury to share his view, nor did he inject the jurors personally into the issue. *Cf. Kelly v. Stone*, 514 F.2d 18 (9th Cir. 1975). Once again, the prosecutor engaged in inflammatory irrelevancies. The jury knew this; indeed, they were specifically told so by Goodwill:

> "The State doesn't want to talk about what they don't have. They didn't, they talked about the little bit of evidence they did have and then Mr. McDaniel made an impassioned plea to how many times did he repeat? I wish you

> had been shot, I wish they had blown his face away. My God, I get the impression he would like to be the man that stands there and pulls the switch on him." A-141-142

Goodwill also acknowledged the "viciousness, the horrible nature . . ." of the evidence (A-140). Moreover, Goodwill specifically instructed the jury to ignore and disregard the ravings of the prosecutor and to "reach the verdict on the evidence." (A-143)

As was previously stated, the remark of Prosecutor White was not the "flagrant example" of impropriety that petitioner claims. The same holds true for McDaniel's assertions that petitioner was a liar. Those remarks were prejudicial but not inflammatory. They very definitely had a basis in the evidence; practically everything petitioner presented was

directly contradicted by the state's evidence. The characterization of petitioner's testimony as a lie was permissible since his testimony is part of the evidence; a comment on the evidence is allowed. *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974); *United States v. Spain*, 536 F.2d 170 (7th Cir. 1975). Besides, the jury knew full well that it alone had the privilege of labeling anyone a liar.

The various other remarks petitioner categorizes as generally damning are nothing more than additional examples of either irrelevant comment or in response to existing fact. For example, the remark that defense counsel would "try the Polk County Sheriff's office" as well as both prosecutors constituted nothing more than a recitation of what had already transpired.

The closing argument for the defense contained allegations of criminal negligence on the part of the sheriff's office (A-111) as well as exaggerated expressions of doubt as to all the state's witnesses. When one questions both the integrity of evidence and the competency of those who gathered that evidence, is not that the same as "trying" the state's case?

Although petitioner would deny us refuge in the doctrine of harmless error, we nevertheless seek its saving principles. He relies primarily on *Chapman v. California*, 386 U.S. 18 (1967), which, while factually distinguishable, is nonetheless illuminating as to the application of the doctrine. There, the prosecutor fully utilized a California constitutional provision allowing him to comment on the

defendant's failure to testify. Prior to appeal that provision was declared invalid by this Court. The defendants' convictions were nonetheless affirmed on the basis of harmless error. This Court refused to follow the California Supreme Court and clearly held that when a specific federal constitutional provision is involved, i.e., the right not to be compelled to be a witness against one's self, the harmless error doctrine must be narrowly applied; its operation cannot occur unless the appellate court is convinced beyond a reasonable doubt that the error could not have contributed to the conviction.

Respondent contends that the Fifth Amendment right involved in *Chapman, supra,* is more easily defined and recognized than is the right to a fair trial. The former

is clearly delineated and is virtually absolute. The latter is, at best, indistinct and cannot be defined much less constitutionally measured unless and until the totality of circumstances is reviewed.

When reviewing a Chapman situation, the violation of the right is presumed; the task is to determine if that violation could have reasonably infected the verdict. When reviewing the situation at bar, respondent submits that the trial is presumed to have been fair; it must be determined first, whether a violation occurred and second, whether it rendered the trial unfair. We contend that the harmless error doctrine operates in a case such as this by making the decision whether, if error has been found to exist, the verdict could stand without it. Although rhetorically posed, the question demands an

affirmative answer. Contrary to petitioner's assertion, the evidence of guilt was in fact overwhelming. Had *no* closing argument been made by the state, the jury could and would have still had before it sufficient evidence to convict. As Justice Rehnquist stated in *Schneble v. Florida*, 405 U.S. 427 (1972):

> "Judicious application of the harmless-error rule does not require that we indulge assumptions of irrational jury behavior when a perfectly rational explanation for the jury's verdict, completely consistent with the judge's instructions, stares us in the face." 405 U.S. at 432

Distilled to its essence, resolution of this issue turns rather distinctly upon one salient factor: the intelligence of the jury. To be sure, the average jury is not composed of country bumpkins who are easily persuaded by the exhortations of a carnival barker as he parades

before them his wares of cheap thrills and sordid sights. By virtue of *voir dire* we eliminate that situation. Given the highest possible assurance our system of justice permits, how can it logically be contended that this or any jury reacted in the manner petitioner alleges? Either we dispense with *voir dire* or we do away with closing arguments; either we disallow the choosing of a fair, impartial and *intelligent* jury or we stop arguing our cases to them.

As was so aptly stated by defense counsel Goodwill:

> "Right after that instruction, you will be told by the Judge that it is to the evidence, the words, the pictures, the whole works, the evidence, and to it alone that you are to look for the proof. *You can't prove him guilty on what Mr. McDaniel says, and by the same token, you can't find him innocent on what I say.*" (emphasis

added) at A-155.

It is the intelligence of the jury which actually requires the necessity of objection discussed *infra*. If erroneous conduct has in fact occurred at trial, the mental purity of the jury can still be maintained by objecting and, if appropriate, requesting a curative instruction. The Florida Supreme Court realized this by its reference to *State v. Jones, supra, Darden v. State*, 329 So.2d 287 (Fla. 1976) at 291. However, the rule in *State v. Jones* does not preclude appellate review even in the absence of objection when the defendant's right to due process of law has been violated. See *Thompson v. State*, 318 So.2d 549 (Fla.App. 4th 1975) (citing numerous federal cases).

Terminally, we respectfully submit that if the Court follows the rule set forth in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), and reiterated in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), reversal of the conviction is nowise indicated. The remarks, although improper, did not deprive petitioner of a fair trial or due process of law.

Referring to remarks contained in a prosecutor's closing argument, Justice Douglas in *Socony-Vacuum Oil Co., supra*, stated:

> "They were, we think, undignified and intemperate. They do not comport with the standards of propriety to be expected of the prosecutor. But it is quite another thing to say that these statements constituted prejudicial error. In the first place, it is hard for us to imagine that the minds of the jurors would be so influenced

by such incidental statements during this long trial that they would not appraise the evidence objectively and dispassionately. In the second place, this was not a weak case as was Berger v. United States, 295 US 78, 79 L.ed 1314, 55 S. Ct. 629, where this Court held that prejudice to the accused was so highly probable as a result of the prosecutor's improper conduct 'that we are not justified in assuming its nonexistence.' (p. 89.) Cf. New York C. R. Co. v. Johnson, 279 US 310, 73 L ed 706, 49 S.Ct. 300. Of course, appeals to passion and prejudice may so poison the minds of jurors even in a strong case that an accused may be deprived of a fair trial. But each case necessarily turns on its own facts. And where, as here, the record convinces us that these statements were minor aberrations in a prolonged trial and not cumulative evidence of a proceeding dominated by passion and prejudice, reversal would not promote the ends of justice."
310 U.S. at 239,240

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Florida Supreme Court, upholding petitioner's judgment and sentence, should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5382

WILLIE JASPER DARDEN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In its brief the state of Florida advances two alleged technical impediments to the Court's consideration of petitioner's claim that the prosecution's arguments to the jury were so flagrantly improper as to deprive him of his constitutional right to a fair trial. We first demonstrate that these procedural arguments are unsound and then consider the state's half-hearted effort to sustain petitioner's conviction and death sentence on the merits.

ARGUMENT

I.

THE COURT SHOULD DECIDE ON THE MERITS PETITIONER'S CLAIM THAT HE WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL, FOR THIS QUESTION WAS ADEQUATELY PRESENTED BELOW, AND WAS DECIDED BY THE FLORIDA SUPREME COURT.

Though it did not so contend in opposition to the petition for certiorari, respondent now urges that the Court dispose of this case on procedural grounds. First, respondent says, Darden's contention that the prosecution's misconduct deprived him of a fair trial was premised and decided in the courts below upon state grounds rather than upon the Fourteenth Amendment to the Constitution; hence, according to respondent, the Court lacks jurisdiction to consider the issue under 28 U.S.C. §1257. Second, respondent contends that the Florida Supreme Court refused to set aside petitioner's conviction because the objection admittedly interposed by petitioner's trial counsel during the prosecution's summation to the jury was inadequate to preserve the issue for appellate review.

We answer these points in reverse order, dealing first with respondent's waiver claim.

A. Petitioner's trial counsel adequately objected to at least a portion of the prosecution's closing argument and, in any event, the court below considered and decided the merits of petitioner's challenge to it.

Relying upon *Estelle v. Williams*, 425 U.S. 501 (1976), and *Francis v. Henderson*, 425 U.S. 536 (1976), as controlling authority, respondent asks that Darden's conviction and death sentence be affirmed because of the alleged absence of adequate contemporaneous objection by his trial counsel to the state's acknowledged improprieties in summation. Resp. Br. pp. 14-23.[1] Several separate reasons compel rejection of respondent's position.

1. Unlike the state courts in *Estelle v. Williams, supra*, and *Francis v. Henderson, supra*, which, in accordance with settled state practice, had refused to consider untimely objections to alleged deprivations of right, here the court below fully considered and decided, albeit adversely, petitioner's claim that the prosecution's summation denied him a fair trial. Indeed, although a variety of other grounds for reversal were advanced, *Darden v. State*, 329 So.2d 287, 288 (Fla. 1976), virtually the entirety of the quite lengthy majority and dissenting opinions were devoted to the question "whether statements made by the assistant state attorneys in closing argument were so inflammatory and abusive as to have deprived Appellant of a fair trial." *Id.* at 289. Because the Florida court afforded plenary consideration to Darden's challenge to the summation, this Court may do so also, if, as we show

[1] References preceded by "Resp. Br." are to the pages of the state's brief.

hereafter (pp. 8-13, *infra*), the effect of the decision below was to deny a federal right. *Boykin v. Alabama*, 395 U.S. 238, 241-42 (1969); *Coleman v. Alabama*, 377 U.S. 129 (1964); *Raley v. Ohio*, 360 U.S. 423, 436 (1959); *Whitney v. California*, 274 U.S. 357, 360-63 (1927).

We recognize, of course, that in the final paragraph of its opinion–as a kind of afterthought–the majority of the Florida court recited "that a prosecutor's challenged argument will be reviewed on appeal only when a timely objection is made." *Darden v. State, supra*, 329 So.2d at 291. But, even in so stating, the court did not assign inadequacy of objection as a ground of its decision and, given its protracted consideration of the merits, this Court ought not to infer a finding of waiver in the absence of a clear state court ruling to that effect, especially in a capital case. "In death cases doubts . . . should be resolved in favor of the accused." *Andres v. United States*, 333 U.S. 740, 752 (1948); see *Reid v. Covert*, 354 U.S. 1, 45-46, 77-78 (1957) (concurring opinions of Justices Frankfurter and Harlan).

2. Despite the majority's citation of *State v. Jones*, 204 So.2d 515 (Fla. 1967), in the final paragraph of the decision below the usual practice of the Florida appellate courts–not only in capital cases but in all serious criminal appeals–is to consider all significant prejudicial errors, whether or not adequate objection has been made at trial. Both Florida decisional law and the rules of its Supreme Court emphasize the acknowledged "duty to overlook technical niceties in the interests of justice." *Wells v. State*, 98 So.2d 795, 801 (Fla. 1957).

Consistent with this obligation, Rule 3.7(i) of the Florida Rules of Appellate Procedure authorizes the state's appellate courts "in the interest of justice, [to] . . . notice jurisdictional or fundamental error apparent in the record-on-appeal, whether or not it has been argued in the briefs or made the subject of an assignment of error, or of an objection or exception in the court below."[2] Again, Fla. R. App. P. 6.16 empowers reviewing courts in their "discretion, if . . . the interests of justice . . . [so] require, [to] review any other things [to which no objection was taken] said or done in the cause which appear in the appeal record." In the case of "a defendant who has been sentenced to death," the rule continues, the appellate courts are also to "review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not."

Applying these rules, the Florida appellate courts–both prior and subsequent to *State v. Jones, supra*–have repeatedly reversed convictions because of improper prosecutorial argument during summation, despite an absence of contemporaneous objection. *E.g., Wilson v. State*, 294 So.2d 327, 329 (Fla. 1974); *Grant v. State*, 194 So.2d 612 (Fla. 1967); *Pait v. State*, 112 So.2d 380, 384 (Fla. 1959); *Singer v. State*, 109 So.2d 7, 28-30 (Fla. 1959); *Barnes v. State*, 58 So.2d 157, 158-59 (Fla. 1951); *Thompson v. State*, 318 So.2d 549 (Ct. App. Fla. 1975), *cert. denied*, 333 So.2d 465 (Fla.

[2] Improper conduct by the prosecution in summation has often been held by the Florida courts to constitute "fundamental error" for purposes of Rule 3.7(i). *E.g., Pait v. State*, 112 So.2d 380, 384 (Fla. 1959).

1976); *Knight v. State*, 316 So.2d 576 (Ct. App. Fla. 1975).[3]

Over and over again, these decisions have reaffirmed that the "absence [of objection] will not suffice [to bar appellate review] where the comments or repeated references are so prejudicial to the defendant that neither rebuke nor retraction may entirely destroy their influence in attaining a fair trial." *Wilson v. State, supra*, 294 So.2d at 329.

In similar vein, Florida's appellate courts have frequently and unhesitatingly reversed convictions, even in non-capital cases, for erroneous instructions to the jury, improper admission or exclusion of evidence, or the like, notwithstanding counsel's failure to object. *E.g., Anderson v. State*, 276 So.2d 17, 19 (Fla. 1973); *Burnette v. State*, 157 So.2d 65, 67 (Fla. 1963); *Wells v. State*, 98 So.2d 795, 801-02 (Fla. 1957); *Harrison v. State*, 5 So.2d 703 (Fla. 1942); *Cooper v. State*, 186 So. 230 (Fla. 1939); *Austin v. Wainwright*, 305 So.2d 845 (Ct. App. Fla. 1975); *Whitehead v. State*, 245 So.2d 94, 99 (Ct. App. Fla. 1971); *see Songer v. State*, 322 So.2d 481 (Fla. 1975); *LaMadline v. State*, 303 So.2d 17 (Fla. 1974).

Indeed, our examination of these and other Florida decisions on appeals from convictions for the more serious felonies suggests that reliance upon a failure of contemporaneous objection as a ground for affirmance is the exception and the contrary practice the rule. In

[3]Indeed, at one point in its brief, Resp. Br. p. 46, the state appears to acknowledge that the absence of objection "does not preclude appeallate review" under Florida practice, at least when the challenged conduct would infringe the defendant's right to due process.

such circumstances, this Court has not allowed discretionary invocation of a claim of waiver to foreclose consideration upon the merits of a deprivation of federal right. *Barr v. City of Columbia*, 378 U.S. 146, 149-50 (1964); *Williams v. Georgia*, 349 U.S. 375, 382-83, 389-91 (1955); *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

3. Apart from these considerations, petitioner's trial counsel did, in fact, object on at least one occasion to the prosecution's conduct during summation (A-136). Thus, he requested that the court direct the prosecutor to cease expressing his wish that "someone would shoot this man [the petitioner] or that he would kill himself." The court overruled the objection without any rebuke of the prosecutor or instruction to the jury.

While this objection to the prosecution's conduct was hardly a model of precise articulation and was not reiterated, it was nonetheless sufficient to bring to the court's attention at least one facet of the prosecution's misconduct. Particularly in view of the often stated Florida rule that "it is the duty of the trial court on his own motion to restrain and rebuke counsel from indulging in [inflammatory and abusive] argument," *Grant v. State, supra*, 194 So.2d at 614; see *Thompson v. State, supra*, this objection surely afforded the trial court an opportunity to rule on the propriety of the prosecution's summation and was, for that reason, adequate to preserve the issue for appeal.

4. For all of the foregoing reasons the decisions in *Estelle v. Williams, supra*, and *Francis v. Henderson, supra*, do not govern here. In neither of those cases was any exception taken to the challenged state practice until long after the time provided by state law. As a result, in neither case had the state courts had the

opportunity to pass upon—nor had they, in fact, passed upon—the asserted deprivation of right. Moreover, in both cases, the state's reliance upon a claim of waiver accorded with settled state practice.

5. Finally, Rule 40(1)(d)(2) of this Court empowers it, " 'at its option, . . . [to] notice a plain error not presented.' " The discretion conferred by the Rule "has been long acknowledged . . . , recently affirmed . . . , and extends to review of the trial court record." *Vachon v. New Hampshire*, 414 U.S. 478, 479 n. 3 (1974); *see Brown v. Mississippi*, 297 U.S. 278, 286-87 (1936). Invocation of the right of review afforded by this rule is particularly apt here, both because the question at issue was fully presented and decided below and because the lawfulness of a capital conviction is at issue.

B. This Court has jurisdiction to review the decision below, for the federal constitutional basis of petitioner's challenge to the prosecution's summation was adequately presented to and was passed upon by the Florida Supreme Court.

Respondent's alternative procedural argument is that the Court may not review petitioner's claim that he was deprived of a federal constitutional right since, as presented to the court below, the claim was founded on state law principles and was decided without reference to the *constitutional* right to a fair trial. Resp. Br. pp. 11-14.

Because the Florida court explicitly recited that the issue before it was "whether statements made by the assistant state attorneys in closing argument were so

inflammatory and abusive as to have deprived the Appellant of a fair trial," *Darden v. State, supra*, 329 So.2d at 289, respondent's contention, it seems to us, amounts to no more than a fine spun quibble over labels. But, even apart from this, respondent's position withstands scrutiny no more adequately than the procedural argument previously discussed.

1. First, respondent's characterization of the form in which petitioner's claim was submitted to the court below is simply inaccurate. Petitioner's assignment of error 33, submitted to the Florida Supreme Court in accordance with Fla. R. App. P. 6.7, explicitly challenged the prosecution's summation upon constitutional grounds. It recited: "Remarks during prosecutors' closing arguments were so prejudicial as to violate Defendant's right to due process of law and to a fair trial." In his brief to the Florida court petitioner specifically adverted to assignment of error 33 as the basis of his argument concerning the prosecution's summation to the jury.[4]

Taken alone, we submit that this is a sufficient affirmative showing that the failure of the majority opinion below to refer to the federal constitutional basis for petitioner's claim of deprivation of the right to a fair trial was not "due to want of proper presentation in the state courts." *Street v. New York*, 394 U.S. 576, 582 (1969).

2. Moreover, it is clear from the dissenting opinion below that the justices voting to affirm petitioner's conviction must have recognized that his claim of denial of the right to a fair trial was predicated on federal

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[4] Petitioner's brief in the Supreme Court of Florida p. 65.

constitutional grounds as well as on state law. According to the dissenters, the majority's ruling deprived petitioner of "a federal constitutional right to a fair and impartial trial in the courts of this State. U.S. Const. Amends. VI, XIV." *Darden v. State, supra,* 329 So.2d at 295. Thus, the majority of the Florida Supreme Court can hardly have failed to understand the constitutional dimension of the issue before them. *Cf. Boykin v. Alabama*, 395 U.S. 238 (1969) (four of seven Alabama Supreme Court justices discussed, *sua sponte*, the adequacy of the process by which petitioner's guilty plea had been accepted, although not in constitutional terms).

Nor can the Florida court have doubted that its affirmance of petitioner's conviction necessarily involved the rejection of a claim of federal constitutional rights. As Justice Stewart wrote for the Court in analogous circumstances in *Turner v. Louisiana*, 379 U.S. 466, 471 (1965): "While thus casting its judgment in terms of state law, the [state] court's affirmance of . . . [the] conviction necessarily rejected his claim that the conduct of the trial had violated the Fourteenth Amendment." See also *Coleman v. Alabama*, 377 U.S. 129 (1964); *Raley v. Ohio*, 360 U.S. 423, 436 (1959).

3. In the circumstances at hand, respondent's reliance on *Cardinale v. Louisiana*, 394 U.S. 437 (1969), and like authorities, is plainly mistaken. In *Cardinale*, as in *Tacon v. Arizona*, 410 U.S. 351 (1973), *Picard v. Connor*, 404 U.S. 270 (1971), and *Hill v. California*, 401 U.S. 797 (1971), the federal questions argued to the Court "had never been raised, preserved, or passed upon in the state courts below" in any form. *Cardinale v. Louisiana, supra*, 394 U.S. at 438. Thus, the state

courts in those cases had not been afforded "a fair opportunity to consider [these constitutional] claim[s] and to correct [the] asserted constitutional defect[s]" in the defendant's convictions. *Picard v. Connor, supra,* 404 U.S. at 276.

Here, by contrast, the question whether Darden was deprived of the right to a fair trial (i) was presented to the court below in both state law and federal constitutional terms and (ii) in any event, was linguistically and analytically "the same [under both federal and state law] despite variations in the legal theory . . . urged in its support." *Picard v. Connor, supra,* 404 U.S. at 277.

Indeed, the reasons advanced by the Court in *Cardinale* for its refusal "to decide federal constitutional issues raised here for the first time on review of state court decisions," 394 U.S. at 438, point up the inapplicability of that decision to the circumstances at hand. Thus, Justice White pointed out that "[q]uestions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." *Id.* at 439. In the present case, consideration below of petitioner's claim that the prosecution's misconduct deprived him of his right to a fair trial could hardly have been more thorough; the state court considered the issue at length and on precisely the same record required to address the claim in federal constitutional terms.

Again, Justice White reasoned that "in a federal system it is important that state courts be given the first opportunity to consider the applicability of state [law] in light of constitutional challenge." *Ibid.* Here, as we have already suggested, the Florida Supreme Court was assuredly on notice that, if state rules defining the limits of proper prosecutorial conduct did

not require the reversal of petitioner's conviction, the commands of the Fourteenth Amendment might compel such a result.

Thus, petitioner afforded the court below the opportunity that Justice White spoke of in *Cardinale*; this Court does not lack jurisdiction merely because the Florida court rejected that opportunity.

4. The cases that are controlling here are *Stanley v. Illinois*, 405 U.S. 645 (1972), and *Vachon v. New Hampshire*, 414 U.S. 478 (1974) (*per curiam*). The former teaches that, when "the constitutional premise [has been adequately] raised below," the Court may reach its "result by a method of analysis readily available to the state court," though not utilized by it. 405 U.S. at 658 n. 10. See also *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 444 (1969); *Braniff Airways, Inc. v. Nebraska State Board*, 347 U.S. 590, 598-99 (1954).

Vachon establishes that, even when the federal constitutional underpinning of the contention urged upon the Court was not fully articulated below, the Court may grant relief, if the substance of the argument in both courts was the same.

In the present case, having recognized that the issue before it was whether petitioner had been denied the right to a fair and impartial trial, consideration of the issue in terms of the Due Process provision of the Fourteenth Amendment was an obvious "method of analysis readily available to the state court." Indeed, except for the label, the "method of analysis" actually employed by the court below was precisely the same as that which would have been required had the court approached petitioner's claim in federal constitutional

terms. This Court would therefore have jurisdiction over petitioner's claim even if petitioner's assignment of error had not mentioned due process and even if the dissenting opinion below had not relied on the Fourteenth Amendment.

II.

THE PROSECUTION'S MISCONDUCT IN SUMMATION DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Respondent acknowledges, as it must, *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); see *Frazier v. Cupp*, 394 U.S. 731, 736 (1969), that a prosecutor's summation may so grossly transgress the bounds of legitimate jury argument as to be "constitutionally improper and [to] den[y] due process." Resp. Br. p. 28. Respondent also concedes that the prosecution's summation in this case was replete with statements that it labels variously as "utterly irrelevant," bearing "no rational relationship to the question of guilt or innocence," "inflammatory irrelevancies," "improper appeal[s] to the jury's emotions," "prejudicial," and "the ravings of the prosecutor." Resp. Br. pp. 31, 37, 38, 39. Seemingly, respondent also acknowledges that the persistence of the prosecution's misconduct is itself proof of its willfulness. Necessarily, the state's attorneys intended their outrageous arguments to influence the jury to return a guilty verdict and thereafter to recommend the imposition of a sentence of death.

Nonetheless, respondent argues, the Court should decline to hold that petitioner was deprived of his

constitutional right to a fair trial and should affirm his conviction and capital sentence. As best we can follow its reasoning, respondent relies on two alternative theories to support this extraordinary conclusion.

First, it postulates a three-fold test to measure whether a closing argument is "constitutionally improper," Resp. Br. p. 29, and then, while conceding that various portions of the summation here transgressed each facet even of its own test, asserts that no violation of petitioner's constitutional rights occurred, because no single remark of the prosecution simultaneously infringed all three. Second, respondent–as its brief puts it–seeks "refuge" in the "saving principles" of harmless constitutional error, Resp. Br. p. 41, urging that, even if the prosecution's misconduct impaired petitioner's right to a fair trial, the error should not lead to a reversal under respondent's novel reformulation of the harmless error doctrine. Resp. Br. pp. 43-44.

Respondent's contentions accord neither with common sense nor law and the Court should reject them.

1. Proceeding as if *Donnelly v. DeChristoforo, supra,* had never been decided, respondent suggests, without citation to any authority, that a closing argument may work a denial of due process only if each passage in it, taken alone, is at once inflammatory, prejudicial and unsupported by evidence. Resp. Br. pp. 28-29. It then tortuously parses the prosecution's summation, striving to show that, although many of prosecutor McDaniel's remarks were fairly branded with one or two of these characterizations in our opening brief, none of his statements, taken singly and without reference to any other, may properly be labeled with all three adjectives at once. Even then, respondent is able to conclude that petitioner was not deprived of his right to a fair trial

only by insisting that, contrary to the prosecutors' evident premise, the jurors were too intelligent and alert to the irrelevant to be influenced by such improper prosecutorial tactics.

(a) As we showed in our opening brief, pp. 25-28, the Court's focus in the *DeChristoforo* case was not upon attempts at abstract characterizations of the summation there in issue, but upon the more crucial questions of the likely impact of the challenged remarks on the jurors and the willfulness of the prosecutor's alleged misconduct. Thus, Justice Rehnquist, writing for the Court, emphasized that the portion of the prosecutor's argument there complained of was only a single sentence in a lengthy summation, that even this sentence was ambiguous in meaning and could well have slipped out without intent by the prosecutor improperly to influence the jury's deliberations, and that a specific curative instruction had been given by the trial court.

Respondent here advances no reasons for its election to ignore the considerations thought controlling by the Court in *Donnelly v. DeChristoforo*, nor does it take issue with the analysis in our opening brief of the application of the factors utilized by the *DeChristoforo* court to the case at hand. Thus, it acknowledges that McDaniel's summation was replete with "inflammatory irrelevancies" bearing "no relationship to the question [of petitioner's] guilt or innocence," Resp. Br. pp. 38, 31, does not dispute that the prosecutor's constant reiteration of numerous grossly improper themes is compelling proof of a deliberate effort to influence the jury to decide petitioner's fate by reference to considerations unrelated to the evidence at trial, and recognizes that the trial court neither rebuked the prosecutor nor

sought to nullify the impact of his remarks upon the jury.

Given respondent's failure to explain why the considerations thought controlling in *DeChristoforo* should not govern here, we submit that the Court ought not to be detained by respondent's labored effort to show that individual passages of the prosecution's argument, taken in isolation, may not have been at once inflammatory, prejudicial and unsupported by the evidence.

(b) Even apart from the *DeChristoforo* decision, however, respondent's position does not withstand analysis. First, it misreads the clear thrust of the prosecution's improper arguments to the jury. Second, it credits the jurors with a shrewdness and sophistication plainly exceeding any which the state's attorneys at trial were willing to acknowledge.

Despite respondent's tortured attempts to show the contrary, McDaniel's arguments in summation were scarcely naive ramblings of patent irrelevance, as respondent now asserts. For example, McDaniel's diatribe about the Florida Division of Corrections—a discourse conceded to have been both inflammatory and of no legitimate relevance to the jurors' deliberations—cannot, in seriousness, be dismissed as mere abstract criticism, probably without improper influence upon the jury. McDaniel made abundantly clear why, to his mind, the conduct of the Division of Corrections was germane to the jury's decision-making, reminding the jurors several times over that the Division could not be counted upon to keep the public safe from petitioner, if he were acquitted, and that a guilty verdict and recommendation of death was the only way in which the jurors would be assured that petitioner

> "isn't going to get out on the public. It's the only way I know. It's the only way I can be sure of it. It's the only way that anybody can be sure of it now." (A. 123).

Again, to cite just one further example, McDaniel's often-voiced desire that Darden had been killed or maimed—a desire whose recurrent expression in summation respondent itself dubs as "inflammatory irrelevancies," Resp. Br. p. 38—may not be dismissed as so lacking in an appearance of pertinence as to have been devoid of impact on the jury. These sordid statements of hatred, emphasized by the prosecutor time and again, were assuredly not intended as pointless expressions of personal dislike of petitioner. Rather, the jurors were enjoined by McDaniel to share in his wish for "instant justice," Resp. Br. p. 38, and to transform this wish into reality by returning a guilty verdict and a recommendation of death.

Not only does respondent pretend to obliviousness of the plain import of the prosecution's arguments; it also insists that the jurors who determined petitioner's guilt were too wise to have been taken in by these improper tactics. Why this Court should now attribute to the jurors an ability to sift out and disregard the irrelevant and the improper, when the prosecutors who tried petitioner and who were familiar with rural Florida jurors obviously deemed the jurors to lack such a faculty, respondent does not explain.

This Court has pointed out in the past that, because attorneys for the sovereign bring with them in the eyes of the jurors not merely official backing and a desire to procure convictions but a presumed concern to see that justice is done, their arguments carry an apparent legitimacy that, in most circumstances, will induce

acceptance of their relevance without critical reflection. As the Court stated in *Berger v. United States*, 295 U.S. 78, 88 (1935), in speaking of the prosecutor's duty "to refrain from improper methods calculated to produce a wrongful conviction":

> "It is fair to say that the average jury, in a greater or lesser degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions [and] insinuations . . . are apt to carry much weight against the accused when they should properly carry none."

In sum, having repeatedly sought to influence the jury by resort to flagrantly improper arguments, the state should not now be shielded from a finding that its misconduct had its intended effect through allowance of a plea that its attorneys' acts so far exceeded the bounds of legitimate argument that jurors of ordinary intelligence would have paid no attention.

Hence, even accepting respondent's three-pronged test of constitutional improperity in closing argument, once the prosecution's summation is acknowledged to have been repleted with "inflammatory irrelevancies" without "rational relationship to the question of guilt or innocence," Resp. Br. pp. 38, 31, and the misconduct is shown by its very repetition to have been willful, prejudicial effect must be presumed. And, as the Court has frequently recognized in deciding whether a particular procedure or circumstance deprived a defendant of due process, "our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955); see *Sheppard v. Maxwell*, 384 U.S. 333, 352 (1966); *Estes v. Texas*, 381 U.S. 532, 542-43 (1965); *Turner v. Louisiana*, 379 U.S. 466, 471-73 (1965).

2. In our opening brief (pp. 28-31) we showed that under the standards of *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963), and *Chapman v. California*, 386 U.S. 18, 23-24 (1967), the prosecution's impairment of petitioner's right to a trial consistent with due process of law cannot be deemed to have been harmless constitutional error.

Respondent does not directly challenge this showing but instead asks that the Court abandon the *Chapman* standard—at least with respect to constitutional violations not comprehended within any of the specific guarantees of the Bill of Rights—and adopt in its stead a harmless constitutional error test so feckless as to shield from reversal most imaginable infringements of the Fourteenth Amendment rights of criminal defendants. Resp. Br. pp. 41-45.

As we understand respondent's proposed reformulation, it posits that in a case like the present one the inquiry should be whether, absent the constitutionally impermissible conduct or circumstance, sufficient evidence would have been before the jury to permit it to return a guilty verdict. Thus, respondent contends that the constitutional error here was harmless, because "[h]ad no closing argument been made by the state, the jury could and would have still had before it sufficient evidence to convict." Resp. Br. p. 44.

Under respondent's harmless constitutional error reformulation, then, not only is the beneficiary of the constitutional infraction to be relieved of the burden of showing that no harm ensued, but the party victimized by the wrong is to be compelled to demonstrate that, had there been no wrongdoing, he would have been entitled to a directed verdict or acquittal. Put most charitably, respondent's position is nonsense.

First, its reformulation proves much too much, for it would immunize from review all errors, even of constitutional dimension, not involving an evidentiary ruling. Thus, for example, no misconduct in summation, however egregious, could ever lead to the reversal of a criminal conviction.

Respondent's contention proves too much in a second sense, also, for it is inconsistent with many settled decisions of this Court. Respondent's formulation of the harmless error standard would, for example, require the rejection of such plainly sound decisions as *Sheppard v. Maxwell, supra, Estes v. Texas, supra,* and *Turner v. Louisiana, supra.*

Third, respondent's proposed formulation would impose upon victims of asserted constitutional errors a more onerous standard of review than that which prevails in instances of non-constitutional error. As the Court noted in *Chapman v. California, supra,* 386 U.S. at 24, the "common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." Respondent proposes that this rule be reversed–but only with respect to cases of constitutional error.

Fourth, respondent's contention flies squarely in the face of an essential premise of the *Chapman* decision that "[c]ertainly . . . constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless." 386 U.S. at 24.

Finally, as a matter of policy, the harmless error standard for which respondent contends would be a most unsound one, for it would invite prosecutorial misconduct, assuring in advance that, in most instances,

the misconduct would be beyond federal remedy. Moreover, it would afford such assurance even when, as in the present case, the misconduct complained of was both willful and flagrant.

In sum, logic, precedent and sound policy all condemn respondent's effort to avoid the reversal of petitioner's conviction by urging the adoption of a watered-down test of harmless constitutional error. The Court should adhere to the standard of the *Chapman* case and should vacate petitioner's conviction and death sentence.

Respectfully submitted,

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